(13)

No. 04-1739
Title: Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections, Petitioner
v.
Ronald Banks
Docketed: June 27, 2005
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (03-1245)
Decision Date: February 25, 2005
Rehearing Denied: March 22, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jun 20 2005	Petition for a writ of certiorari filed. (Response due July 27, 2005)
Aug 10 2005	DISTRIBUTED for Conference of September 26, 2005.
Sep 1 2005	Response Requested . (Due October 3, 2005)
Sep 30 2005	Brief of respondent Ronald Banks in opposition filed.
Oct 12 2005	DISTRIBUTED for Conference of October 28, 2005.
Oct 31 2005	DISTRIBUTED for Conference of November 4, 2005.
Nov 7 2005	DISTRIBUTED for Conference of November 10, 2005.
Nov 14 2005	Petition GRANTED.
Dec 13 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including January 5, 2006.
Jan 5 2006	Brief amici curiae of Council of State Governments, et al. filed.
Jan 5 2006	Brief amicus curiae of United States filed.
Jan 5 2006	Joint appendix filed.
Jan 5 2006	Brief of petitioner Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections filed.
Jan 23 2006	SET FOR ARGUMENT on Monday, March 27, 2006.
Feb 1 2006	Extension of time within which to file respondent's brief on the merits to and including February 16, 2006.
Feb 7 2006	CIRCULATED.
Feb 9 2006	Brief amicus curiae of Becket Fund for Religious Liberty filed. (Distributed)
Feb 15 2006	Record received from U.S.C.A,. 3rd Circuit. (1 envelope)
Feb 16 2006	Brief of respondent Ronald Banks filed. (Distributed)
Feb 16 2006	Brief amici curiae of Prison Legal News, et al. filed. (Distributed)
Feb 16 2006	Brief amicus curiae of Lumumba Kenyatta Incumaa filed. (Distributed)
Feb 16 2006	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Feb 21 2006	Record received from U.S.D.C. Western District of Pennsylvania. (1 envelope)
Feb 23 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 6 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED Justice Alito took no part in the consideration or decision of this motion.
Mar 14 2006	Reply of petitioner Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections

filed. (Distributed)

Mar 27 2006 Argued. For petitioner: Louis J. Rovelli, Executive Deputy Attorney General, Harrisburg, Penn.; and Jonathan L. Marcus, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for the United States, as amicus curiae.) For respondent: Jere Krakoff, Pittsburgh, Penn.

Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States

JEFFREY BEARD,
Petitioner

v.

RONALD BANKS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a prison policy that denies newspapers, magazines, and photographs to the most difficult inmates in the prison system in an effort to promote security and good behavior violate the First Amendment under the standards of *Turner* and *Overton*?

PARTIES TO THE PROCEEDINGS

The petitioner is Jeffrey Beard, in his official capacity as Pennsylvania's Secretary of the Department of Corrections. Respondent is Ronald Banks, a state prisoner.

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The decision of the Court of Appeals is reported at 399 F.3d at 134 and is reprinted at Pet. App. 1a. The decision of the District Court is not reported, but is reprinted at Pet. App. 32a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 25, 2005. A petition for rehearing was timely filed and was denied on March 22, 2005 by a vote of 6-5. Pet. App. 30a-31a. This petition is being filed within ninety days thereafter. This Court has jurisdiction pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST., Amend I.

STATEMENT OF THE CASE

In Pennsylvania's prison system, the most incorrigible inmates face severe restrictions on their already restricted privileges, subject to reinstatement should their behavior improve. Among other things, they face an almost total prohibition on newspapers, magazines and photographs. Prison officials adopted this policy in order to modify the behavior of these incorrigible inmates, to deter misconduct by others, and to increase prison security. The Court of Appeals,

considering a First Amendment challenge to this policy, held that it could survive this challenge only if prison officials could establish that it addressed specific incidents of inmate misconduct, was the only way to address their rehabilitative and security concerns, and was actually successful. The Court should review this decision because is cannot be squared with the teachings of *Turner v. Safley*, 482 U.S. 78 (1987) and its progeny; or with the decisions of other courts of appeals facing similar situations.

1. The Pennsylvania Department of Corrections established a Long Term Segregation Unit (LTSU) at the State Correctional Institution at Pittsburgh to house inmates that are "the most incorrigible, the most difficult, problematic, and have demonstrated the most behavior conflicts." Pet. App. 34a-35a. Prison officials established the LTSU to improve both inmate behavior and prison security. *Id.*

The LTSU is the "last stop" for inmates who present intractable security or disciplinary problems. Inmates who have failed to respond to other, less restrictive disciplinary programs — known as Special Management Units and Restricted Housing Units — may be transferred into the LTSU. Other candidates for the LTSU are those who have a history of escape attempts or possessed weapons or implements of escape; who have seriously assaulted or caused injury to staff or other inmates; who have a history of sexual predation; or who have committed new crimes while in prison. Pet. App. 3a, fn.2.

Inmates in the less restrictive disciplinary programs have already lost many privileges, such as tobacco use and contact visits.[1] Further restrictions may be

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[1] A comparative chart, an attachment to Department of Corrections Policy 6.5.1, relating to disciplinary housing, and (continued...)

imposed or eased, depending upon the inmates' behavior. In the Special Management Units, for example, inmates may be forbidden or permitted to have radios and televisions in their cells, and may be allowed varying numbers of (non-contact) visits and telephone calls, depending on their progress level. Pet. App. 47a. Similarly, inmates are permitted to possess one newspaper at a time, ten photographs, and from one to ten magazines, depending again on their progress level. *Id.*

The LTSU imposes further restrictions on recalcitrant inmates. The unit has two levels. Inmates are initially placed in Level 2 — the more restrictive level — and spend at least ninety days at that custody level. Pet App. 3a. Besides other restrictions not challenged below, Level 2 inmates are not permitted any newspapers, magazines, or photographs in their cells, nor do they have access to the prison library where newspapers and magazines are available. Although Level 2 inmates are permitted limited visitation with family and correspondence, they are only permitted to receive news clippings in the mail which relate to them. Pet. App. 3a-4a. They are also permitted some legal papers and religious materials in their cells. After the first ninety days, prison officials review an inmate's status every thirty days to determine if promotion to Level 1 is appropriate. If it is, then the inmate may have a newspaper in his cell, and up to five magazines at a time.

Prison officials testified that this regimen promotes positive behavioral changes by encouraging inmates to improve their behavior to regain a desired privilege. This, officials said, was the "most important" goal,

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a part of the record before the lower court, is reproduced at Pet. App. 47a.

achieved by effectively telling the inmate, "You comply, you modify your behavior, and you can obtain these things, these privileges, . . ., you have the ability through your own actions to be promoted . . . from a Level 2 inmate to a Level 1 inmate, and we do that every day." Deposition of Joel Dickson, N.T. 86, 88. The restrictions also promote security, in that the limitations on property in the cells make it harder for inmates to conceal contraband; in addition, the specific property prohibited — newspapers and magazines — can be rolled up and used as blow guns or spears, used to fling feces or urine at guards, or as tinder to start a fire in the cell. Pet. App. 40a-41a.

2. The respondent brought this action on behalf of himself and those similarly situated, contending that the prohibition on newspapers, magazines and photographs for Level 2 inmates violates the First Amendment. The District Court certified a class, and the parties, after discovery, filed cross motions for summary judgment.

The District Court granted the petitioner's motion and denied the respondent's.[2] Applying *Turner v. Safley*, 482 U.S. 78 (1987), and the Court of Appeal's decision in *Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002), the District Court noted the substantial deference due prison authorities. The District Court accepted that inmates housed in the LTSU posed unique security concerns, and that the policy of denying Level 2 inmates newspapers, magazines, and photographs did serve the goal of improving security, as newspapers, magazines, and photos could be used to fashion weapons or start fires, and that inmates would be more likely to use these items for that purpose than legal

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[2] A Magistrate Judge's report recommended that Petitioner's motion be granted, and the District Court adopted the report as its opinion.

papers and religious texts which they were permitted to have in their cells. Pet. App. 40a. The District Court also concluded that the policy was rationally related to goals of rehabilitation: "Having . . . been transferred to the LTSU, it seems not only rational to impose more restrictive conditions in an effort to encourage compliant behavior but imperative to the success of the LTSU." *Id.*

The District Court went on to say that inmates have alternative means of exercising their rights: first, by modifying their behavior and being promoted to less restrictive custody, and also by visitation and correspondence. Pet. App. 41a-42a. The court also concluded that, in view of the security concerns prompting the challenged policy, accommodating the prisoners' rights would have a negative impact on other inmates and guards in the LTSU. Pet. App. 43a. Finally, the District Court concluded that there were no ready alternatives to the policy: giving the inmates a "reading period" for example, "would not be without sacrifice to the prison's behavioral modification goals," would not prevent prohibited use of magazines and newspapers, and would have an impact on prison resources. Pet. App. 45a.

3.a. A divided panel of the Court of Appeals reversed and remanded for further proceedings. The panel majority acknowledged that "the deterrence of future infractions of prison rules can be an appropriate justification for temporarily restricting the rights of inmates," but thought that "it is unclear how the policy would achieve the deterrence that it seeks", Pet. App. 11a-17a, in view of the indefinite period of confinement in the LTSU and the discretionary nature of decisions regarding custody status; and noted that "the [Department of Corrections] has offered no evidence that the rule achieves or could achieve its stated rehabilitative purpose." Pet. App. 12a. The majority also discounted the prison officials' security concerns,

because "there [was] no evidence in the record of the misuse of periodicals or photographs in any of the ways described by the DOC," that is, no evidence of "specific incidents" where these materials had been used to start fires or fling feces. Pet. App. 14a. The majority also thought that, because Level 2 inmates were permitted other flammable materials in their cells, including clothing and legal and religious materials, the ban on papers, magazines and photos "may be too attenuated to be reasonable." Pet. App. 17a. The majority acknowledged testimony that few fires had been started in the LTSU and that paper products were generally used to ignite them but criticized the lack of specific testimony "as to the effect such a ban has had on the frequency of fires, be it in the LTSU or elsewhere." Pet. App. 15a.

The majority rejected the District Court's conclusion that inmates have alternative means of exercising their rights simply by modifying their behavior because "segregation in Level 2 is not linked to a particular infraction and is of potentially unlimited duration," Pet. App. 19a-20a, and because there were no affidavits in the record from those who made decisions regarding custody level or documentation of the review process. Pet. App. 20a.

Finally, the panel majority thought that the prison could accommodate the prisoners' interests by establishing "reading periods" during which they could read newspapers and magazines, or by escorting them individually to a secure mini library "to read a periodical of their choosing." Pet. App. 22a-24a.

b. Judge Alito dissented because he thought the prison policy was constitutional on its face under the *Turner* standards. Judge Alito thought that it was "'rational' for corrections officials to think that inmates who are not in Level 2 will be deterred from engaging in serious misconduct because they do not want to be

transferred to that unit and thus be subjected to the restrictions that accompany that assignment." Pet. App. 26a. "It is also 'rational'," Judge Alito continued, "for corrections officials to think that inmates who are in Level 2 will be deterred from engaging in serious misconduct while in that unit because they wish to be transferred out and thus to escape such restrictions." Pet. App. 26a-27a. Judge Alito noted that the indefinite nature of confinement in the LTSU might diminish its deterrent effect, it would not eliminate that effect as the majority thought, and also faulted the majority for misconstruing the nature of the first *Turner* factor: "This factor requires us to determine whether there is a '*logical connection* between the regulation and the asserted goal,' *see* 482 U.S. at 89 (emphasis added), not whether there is empirical evidence that the regulation in fact serves that goal. The entire system of prison discipline might be imperiled if each sanction for prison misconduct could not be sustained without empirical evidence that the sanction provided some incremental deterrent." Pet. App. 27a-28a. As to the second *Turner* factor, alternative means of exercising the right, Judge Alito found it significant that inmates in Level 2 could still read books and receive letters, and had the option of modifying their behavior so as to be promoted to Level 1. Pet. App. 28a. Finally, as to the availability and impact of accommodation, Judge Alito thought that the modifications to prison policies proposed by the majority "would almost certainly have an impact on prison resources." Pet. App. 29a.

4. The full Court of Appeals narrowly denied petitioner's request for *en banc* rehearing, by a vote of 6-5.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision conflicts with the direction in *Turner v. Safley* that judgments regarding prison administration generally be made by prison

officials, not judges. By requiring prison officials to bear the burden of proving their policies constitutional, it also conflicts directly with *Overton v. Bazzetta*, a case which the Court of Appeals did not mention. The decision also exemplifies a conflict among the circuits regarding the proper application of *Turner* and *Overton*.

A. There is a Conflict Among the Circuits as to the Proper Application of *Turner*.

In *Turner*, the Court set forth the now familiar four pronged test for evaluating the constitutionality of prison rules and policies that implicate inmates' constitutional rights: whether there is a rational connection between the policy and a legitimate government interest, whether inmates have alternative means of exercising the right, the impact of accommodation on guards and other inmates, and whether there are ready alternatives to the policy that will accommodate the inmates' interest. 482 U.S. at 89-91. The Court repeatedly emphasized that the standard adopted in *Turner* was meant to be deferential to prison officials so that they could do their jobs properly.

Thus, in adopting the undemanding standard that a challenged prison regulation need only be "reasonably related to legitimate penological interests," the Court said "[s]uch a standard is necessary if prison administration and not the courts [are] to make the difficult judgments concerning institutional operations." 482 U.S. at 89 (internal quotations and citations omitted). The Court went on to say that "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* Similarly, with respect to the "absence of ready alternatives" part of the standard, the Court emphasized that "[t]his is not a 'least restrictive alternative' test: prison officials do not

have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.* at 90-91.

More recently, the Court in *Overton v. Bazzetta*, 539 U.S. 126 (2003), a case closely similar to this one, reiterated the "substantial deference [due] to the professional judgment of the prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Id.* at 132 (citations omitted), and emphasized that "[t]he burden is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Id.., citing Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S.119, 128 (1977); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987); *Shaw v. Murphy*, 532 U.S. 223, 232 (2001).

1. Despite the Court's clear direction in *Turner*, and again in *Overton*, some Courts of Appeals, like the Third Circuit, have been reluctant to give proper deference to prison officials in matters of prison administration. The decision of the Court of Appeals here is a part of a split among the circuit courts applying *Turner* to analyze restrictions like these. A few Courts of Appeals, particularly predating the Court's decision in *Overton*, have invalidated bans on publications for reasons similar to the Third Circuit's, and even after *Overton*, some courts have failed to give prison authorities proper deference. For example, in *Crofton v. Roe*, 170 F.3d 957 (9th Cir. 1999), the Ninth Circuit held that a regulation on gift publications for the purpose of "inhibit[ing] contraband and strong-arming" was invalid because of the state's failure "to develop a record" to support the ban or to describe "any particular risk created by prisoners receiving such publications." Similarly, in *Thomas v. Leslie*, 176 F.3d 489 (10th Cir. 1999) (unpublished opinion), the Tenth Circuit rejected the argument that a ban on newspapers at a county

detention facility was rationally related to concerns that newspapers could be used as weapons or to start fires, because the prison allowed inmates to have other types of flammable materials in their cells. The court also felt that the inmate's ability to watch television was not an adequate alternative as it did not provide the "depth and diversity" of newspapers. More recently in *Jacklovich v. Simmons*, 392 F.3d 420 (10th Cir. 2004), a post-*Overton* decision, the Court said that a ban on publications for inmates promoted from intake status to Level 1 (the most secure custody level) justified as a behavioral management measure was "unsupported" as it appeared to be based more on custody status than on conduct.

By contrast, other Courts of Appeals have taken an approach more in line with *Turner* and *Overton*. In *Maydak v. United States*, 98 Fed.Appx. 1, 2004 WL 852218 (D.C. Cir. 2004), for example, the Court considered whether a policy of withholding certain publications from inmates in disciplinary custody (in this case, The Wall Street Journal), was constitutional under *Turner*. The Court said that it was permissible as a means to improve behavior, affirming a grant of summary judgment. The Court concisely analyzed each of the four prongs of the *Turner* test in a way very different from the Third Circuit: "permitting inmates whatever reading materials they desire would eliminate one of the punitive aspects of disciplinary segregation (factor one). The government also satisfies the other three factors: Maydak enjoyed access to other reading materials (factor two), accommodating Maydak would make disciplinary segregation appear less unattractive, having a potentially adverse effect on other inmates' incentives for following prison rules (factor three), and Maydak points to no real alternative that BOP could undertake as a disciplinary measure (factor four)." **1.

Other courts have handled similar issues in a similar way. In *Wirsching v. Colorado*, 360 F.3d 1191

(10th Cir. 2004), for example, affirming the grant of a motion for summary judgment, the Tenth Circuit upheld as constitutional a prison regulation that prohibited a convicted sex offender who refused to participate in a sex offender treatment program from visitation with his own children. The prison offered some testimony that visitation could put the children at risk and could be detrimental to the prisoner's rehabilitation. The prisoner argued, much as the respondent does here, that there was no evidence that he ever harmed or attempted to harm his daughter or children like her. Nevertheless, the Court said, although the evidence "may be debatable," the burden of proof was on the prisoner and "substantial deference" was due "the professional judgment of prison administrators," and concluded that "there is a rational connection between the CDOC policy and legitimate governmental interests." 360 F.3d at 1200, citation omitted.

The Court in *Wilkinson v. Austin*, No. 04-495 (June 13, 2005), recently recognized the growing trend to create "Supermax" facilities to segregate the most dangerous prisoners. Evidently, the courts of appeals need further guidance on the proper application of *Turner* and *Overton* to such situations, and the Court should review this case to provide that guidance.

B. The Court of Appeal's Decision is So Far at Odds with *Turner* and *Overton* that it Ought to be Summarily Reversed.

Alternatively, the Court should summarily reverse the judgment of the Court of Appeals because it is at odds with *Turner* and even more at odds with *Overton*, which is almost directly on point and ought to have controlled the result here.

1. In *Overton*, prisoners challenged regulations that restricted visitation rights, *inter alia*, with former

inmates, and limited visitation for inmates with multiple substance abuse violations to attorneys and members of the clergy for a period of two years, to be reinstated at the discretion of prison officials. With respect to the first restriction, the Court found a "self evident connection" between prohibiting visitation with former inmates and an interest in promoting prison security and preventing future crimes. The restriction for substance abuse violators, the Court said, was also legitimate to modify behavior: "withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, *especially for high-security prisoners who have few other privileges to lose.*" 539 U.S. at 134 (emphasis added). The Court also made it clear that the prisoner bears the burden of proving that a policy is unconstitutional, rather than prison authorities of supporting it. These principles are especially important in evaluating the constitutionality of housing units and programs, like this one, designed to deal with "problem" inmates.

The decision of the Court of Appeals here holds prison officials to a strict burden of proof, requires empirical evidence that their policies are narrowly designed to address specific instances of prisoner misconduct, and second-guesses them as to the feasibility of alternative means of accommodating the prisoners' asserted interest. In so doing, it has misapplied *Turner* and completely ignored *Overton's* allocation of burden of proof to the prisoner. It ignores as well as *Overton's* holding that the withholding of privileges is a constitutionally permissible means of attempting to modify prisoners' behavior: there is no constitutionally significant difference between a program that restricts visitation privileges to induce good behavior and one which restricts newspaper and magazine privileges to induce good behavior. The Court should review the case and summarily reverse on the basis of *Overton*.

2. The penological goals here - rehabilitation and security — are indisputable, and the connection between the goals and the challenged policy a simple matter of common sense. As to rehabilitation, it seems obvious, as the Court recognized in *Overton*, that taking privileges away from prisoners who misbehave and restoring them when their conduct improves provides an incentive for good behavior; as the Court likewise recognized in *Overton*, incentives of this kind are especially important — and hard to come by — for the most recalcitrant inmates, who already have fewer privileges than inmates in the prison's general population. The challenged policy is also an inducement to prisoners who are not in the LTSU to behave themselves so they will not be placed there. As to security, it is clear that prisoners can and do start fires, throw feces other objects and make weapons out of paper products like newspapers, magazines, and photographs, and are more likely to do so with these items than with religious texts which they may hold sacred.

It is equally clear that inmates in the LTSU have alternative, although limited means of communicating with the outside world: correspondence, visits, and most importantly, modifying their behavior so as to regain newspaper and magazine privileges. Finally, it is clear that no accommodation by prison officials is possible. Such an accommodation — such as the "reading period" endorsed by the Court of Appeals — would necessarily reinstate in some form the very privileges being withheld, without requiring the inmate to modify his behavior to regain them, thus undermining the policy's rehabilitative goals.

The Court of Appeals here refused to credit these obvious facts and connections, and refused to allow prison officials the leeway to use their experience, judgment, and common sense to deal with behavioral

problems. Instead, the Court of Appeals insisted upon evidence that officials acted in response to specific instances of misconduct, in a narrowly tailored regulation, supported by empirical evidence showing that the regulation is actually effective in achieving the desired goals. Prison officials are thus prohibited from anticipating problems, from experimenting with solutions to problems, and from using their judgment and experience to run the prisons. Instead, every policy that affects an inmate's constitutional rights – and there will be few that do not – will be tried in court. This is the antithesis of the proper arrangement described by the Court in *Turner* and reinforced in *Overton*, and the Court should summarily reverse.

CONCLUSION

The Court should grant the writ.

Respectfully submitted,

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DATED: June 20, 2005

APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1245

RONALD BANKS, for himself and on behalf of all similarly situated prisoners who are confined or will be confined in Long Term Segregation Units of State Prisons located in the Western Judicial District of Pennsylvania,

Appellant

v.

JEFFREY BEARD, in his official capacity as Secretary of the Pennsylvania Department of Corrections

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On Appeal from the United States District Court for the Western District of Pennsylvania

District Court Judge: The Honorable Terrence F. McVerry
(D.C. No. 01-cv-1956)

Argued on October 22, 2003

Before: ALITO, FUENTES, and ROSENN, Circuit Judges

(Opinion Filed: February 25, 2005)

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OPINION OF THE COURT

FUENTES, Circuit Judge

Ronald Banks, on behalf of himself and all other Level 2 prisoners confined in the Long Term Segregation Unit ("LTSU") of the State Correctional Institution at Pittsburgh ("SCI Pittsburgh"), challenges the constitutionality of the Pennsylvania Department of Corrections' ("DOC") policy banning access to newspapers, magazines and photographs for Level 2

inmates, arguing that the policy violates the prisoners' free speech rights under the First Amendment.

The District Court granted summary judgment to the defendant and upheld the policy as reasonably related to legitimate penological interests. We disagree and therefore will reverse.

I. Factual and Procedural Background

The LTSU was established at SCI Pittsburgh in April 2000 as a place to confine a small population of inmates[1] which the DOC views, because of their history of behavior in prison, as too disruptive, violent or problematic to house elsewhere.[2] Inmates are classified at "Level 2" when admitted to the Unit, must remain there a minimum of 90 days, and may remain at Level 2 indefinitely. The length of time a prisoner may spend in the LTSU is open-ended and subject to the discretion of prison personnel. Department policy prohibits Level 2 prisoners from receiving newspapers or magazines

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[1] The maximum population in the LTSU is 40. (App. 92) Deposition testimony in this case discloses that, during the relevant period, the LTSU population was comprised of 36 Level 2 and three Level 1 inmates. (App. 93)

[2] The relevant DOC regulations state: "Any inmate who is, has or may be planning to engage in the following activities may be appropriate for assignment in the LTSU: (1) inmates who fail to complete SMU [Special Management unit]; (2) serious escape history; (3) assaultive behavior with the intent to cause death or serious bodily injury; (4) injury to staff and/or inmates; (5) engaging in facility disturbances(s); (6) recorded history of exerting negative influence in facility activities; (7) Security Threat Group (STG) member or other unauthorized organization(s); (8) Perpetuated criminal activity that threatens the community; (9) a history of being a sexual predator; and/or (10) possessing weapons and/or implements of escape." 6.5.1 Administration of Security Level 5 Housing Units Procedure Manual at 1-16.

directly from the publisher, from the prison library, or from any other source for the duration of their confinement at Level 2 status unless the publication is religious or legal in nature. Individual articles clipped from publications are prohibited, unless they relate to the inmate or his family. Also prohibited is the possession or receipt of photographs of spouses, other family members, or friends.

Other DOC rules which govern life at LTSU Level 2 prohibit inmates from having radios or televisions, permit phone calls only in emergencies or when related to inmates' legal representation, limit inmates to one visit with an immediate family member per month, and require inmates to remain in their cells 23 hours a day, one inmate to a cell. Inmates are permitted, however, religious or legal publications and paperback books that can be ordered from the prison library. To review legal materials, once LTSU inmate at a time may be let out of his cell and is escorted from it to a "mini law library" in hand and leg irons by two corrections officers. (App. 11)

The policy challenged here is unique in the state prison system, even among other segregated inmates. Level 1 LTSU inmates are permitted one subscription newspaper in their cells which can be exchanged on a one-for-one basis and are also permitted five subscription magazines at any given time.[3] Department policy also authorizes Special Management Unit ("SMU") inmates (another class of segregated inmates identified as being among the most difficult inmates in the system) to have various numbers of subscription newspapers, magazines and photographs in their cells, depending on their classification level. (App. 77) Similarly, dangerous inmates who are segregated in the Department's regular Restrictive Housing Unit on

[3] The photograph prohibition, however, remains unchanged.

Administrative Custody status for security reasons are permitted one subscription newspaper in their cells which can be exchanged on a one-for-one basis, as well as subscription magazines and up to 10 photographs.

Deputy Superintendent Joel Dickson, who supervises the LTSU, testified in his deposition that the prohibition serves several penological purposes, which were reiterated by the defendant in its briefs. First, and emphasized by Dickson as most important, is behavior modification and rehabilitation. Dickson explained that in Level 2, inmates are deprived of certain privileges to create an incentive to comply with prison rules and thereby be removed to Level 1 and eventually to the general population. Among Level 1 inmates, the prospect of having the privileges denied discourages backsliding. Also, Dickson explained that as inmates improve their behavior to earn privileges, they become better integrated members of prison society or, if released, better members of free society and "more productive citizen[s]." (App. 111) Second, the less material Level 2 prisoners have in their cells, the easier it is for correctional offices to detect concealed contraband and provide security. Third, newspapers and magazines can be rolled up and used as blow guns or spears, can fuel cell fires, or can be used as crude tools to catapult feces at the guards.

Plaintiff Ronald Banks filed the Complaint in this action on October 18, 2001. Seeking equitable and declaratory relief, the Complaint challenged the constitutionality of the DOC policy that denies Level 2 inmates access to newspapers, magazines and photographs of family members and friends. The inmates argued that, under *Turner v. Safley*, 482 U.S. 78 (1987), the policy offends their right to free speech either because it bears no rational connection to any legitimate penological interest or because it is an exaggerated response to such an interest. A motion for

class certification was filed and granted on March 22, 2002. After discovery was completed, the parties filed cross-motions for summary judgment in September of 2002.

On November 15, 2002, Magistrate Judge Robert Mitchell recommended granting summary judgment to the DOC. The recommendation reasoned that the *Turner* factors weighed in the DOC's favor and that the policy was rationally related to, and furthered the legitimate penological interests of, institutional security and prisoner rehabilitation. Despite Banks' objections, on January 10, 2003 the magistrate's recommendation and reasoning were adopted by order of the District Court.

The District Court reasoned first that the policy is not an impermissible First Amendment violation because it is rationally related to the legitimate and interrelated penological interests in rehabilitation and security. It encourages compliance with prison rules and deprives especially incorrigible prisoners of material from which they can fashion crude weapons or feed cell fires.

Second, the District Court held that the policy is not an exaggerated response to the stated penological concerns. The court agreed with the DOC that inmates can meaningfully exercise the burdened First Amendment rights by qualifying with good behavior for promotion to Level 1 or by corresponding with family and friends. Furthermore, given the particular intractability of Level 2 inmates, any further accommodation of their rights would impose costs that cannot be characterized as only *de minimus*.[4] Banks

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[4] Here, the DOC asserts the existence of the "ripple effect," cited in *Turner*, as a magnifier of cost in the prison environment. 482 U.S. at 90.

timely appealed the District Court's grant of summary judgment.

II. Jurisdiction and Standard of Review

The District Court had original jurisdiction over the action pursuant to 28 U.S.C. § 1343 because the claim asserts a violation of the First Amendment to the U.S. Constitution. This Court has appellate jurisdiction over the order of the District Court granting summary judgment pursuant to 28 U.S.C. § 1291. We review *de novo* the District Court's decision to grant the DOC's motion for summary judgment. *See Sutton v. Rasheed*, 323 F.3d 236, 248 (3d Cir. 2003). In reviewing the record, we view the evidence and any inferences therefrom in the light most favorable to the non-moving party, and resolve all factual conflicts in its favor. We reverse the District Court's decision where there are genuine issues of material fact precluding judgment as a matter of law. *See Suders v. Easton*, 325 F.3d 432, 440 (3d Cir. 2003).

III. Discussion

A. *The Turner Standard*

We have repeatedly echoed the Supreme Court's admonition that "prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Ramirez v. Pugh*, 379 F.3d 122, 126 (3d Cir. 2004); *Fraise v. Terhune*, 283 F.3d 506, 515 (3d Cir. 2002) (quoting *Turner*, 482 U.S. at 84). In *Turner*, the Supreme Court acknowledged, however, that inmates' constitutional rights may in some cases be limited, and held that a prison regulation that impinges on inmates' constitutional rights "is valid if it is

reasonably related to legitimate penological interests." 482 U.S. at 89.[5]

The Supreme Court articulated an analytical framework within which the reasonableness of such a regulation is assessed by weighing four factors. First, there must be a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (quotations omitted). Second, the court must determine "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. Third, the court must assess "the impact accommodation of the asserted constitutional right will have on guards and other inmates" and prison resources generally. *Id.* Finally, the court must consider whether there are "ready alternatives" to the regulation that "fully accommodate the prisoners' rights at *de minimus* cost to valid penological interests." *Id.* at 90-91. The existence of such alternatives is evidence that the regulation is an "exaggerated response to prison concerns." *Id.* at 90 (quotations omitted).

Although the Supreme Court emphasized that the judiciary is often "ill equipped to deal with the increasingly urgent problems of prison administration and reform," and should therefore give significant deference to prison officials in interpreting and implementing regulations,[6] the Court was not

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[5] Neither party contests that inmates have a First Amendment right to receive magazines and newspapers through the mail. *See Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir. 1995); *Sizemore v. Williford*, 829 F.2d 608, 610 (7th Cir. 1987).

[6] As the District Court correctly pointed out, *Fraise* also asserted that particular deference to prison authorities is especially appropriate when a regulation implicates prison security. 283 F.3d at 516.

relinquishing the policing of prison policy to prison administrators. *Id.* at 84 (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)). To the contrary, in *Turner*, while the Supreme Court upheld a rule barring inmate-to-inmate correspondence as reasonably related to legitimate security interests, it also struck down an inmate marriage restriction as an "exaggerated response to petitioners' rehabilitation and security concerns." *Turner*, 482 U.S. at 91. The Court held that the rule "sweeps much more broadly" than can be explained by the stated objectives and therefore failed the reasonable relationship test. *Turner*, 482 U.S. at 98.

As the Eleventh Circuit has aptly noted, "traditional deference does not mean that courts have abdicated their duty to protect those constitutional rights that a prisoner retains." *Fortner v. Thomas*, 983 F.2d 1024, 1029 (11th Cir. 1993) (citations omitted). If *Turner* is to be a meaningful limit on the discretion of prison administrators, its four factors must be diligently weighed by reviewing courts.

B. Factor One: Rational relationship to legitimate penological interest

Banks argues that the connection between the policy and the valid penological objectives cited as its justification is too attenuated to be rational.

1. Rehabilitation

Unlike the government's interest in security, the rehabilitation objective has never been defined by the Supreme Court, and its contours remain "quite amorphous and ill-defined." *Ramirez*, 379 F.3d at 128 (citing *Amatel v. Reno*, 156 F.3d 192, 209 (D.C.Cir. 1998) (Wald, J., dissenting)). Clearly, however, restrictive prison policies can be designed to target

particular behaviors for which prisoners were incarcerated, or those that arose and presented security risks during incarceration.[7] *Id.*

The District Court essentially determined that (1) withholding privileges to get compliance is a sensible policy, and (2) denying all other privileges short of access to publications and photographs had proven in the past not to be a sufficient incentive for behavior modification because, if it had been, inmates would not have been transferred to LTSU Level 2. Therefore, the District Court found that denying publications and photographs was a rational next step.

Certainly, "deterrence of future infractions of prison rules" is a legitimate penological interest. *See Gregory v. Auger*, 768 F.2d 287, 290 (8th Cir. 1985); *Daigre v. Maggio*, 719 F.2d 1310, 1313 (5th Cir. 1983). In the Fifth and Eighth Circuits, temporary restrictions on prisoners' receipt of certain mail and subscription publications in disciplinary segregation have been upheld following exactly the logic advanced by the DOC here. Those courts held that such restrictions made disciplinary segregation less endurable and therefore discouraged inmates from the rule infractions that would lead to such segregation. *See also Guajardo v. Estelle*, 568 F.Supp. 1354, 1366 (D.C. Tex. 1983) (permitting inmates in solitary confinement access to books, magazines and newspapers may "water down the conditions in solitary and would make the threat of

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[7] In *Waterman v. Farmer*, for example, this Court upheld a prison regulation justified as rehabilitative, which restricted sex offenders' access to pornographic materials. 183 F.3d 208, 215 (3d Cir. 1999). Prison authorities submitted affidavits from two psychologists who testified that pornographic materials threatened to thwart the effectiveness of the treatment given to sex offenders, and therefore that limiting access to such material was a sensible rehabilitation strategy.

solitary confinement meaningless") (internal quotations omitted).

Although we agree that deterrence of future infractions of prison rules can be an appropriate justification for temporarily restricting the rights of inmates, we cannot say that the DOC has shown how the regulations in this case serve such a purpose. We recognize how such a rule could be reasonably related to a penological interest in rehabilitation in "disciplinary segregation" where inmates are placed for "specific rule infraction[s]" and for limited and specific periods, but this is not such a case. *Spellman v. Hopper*, 95 F.Supp.2d 1267, 1281 (M.D.Ala. 1999).

Although the DOC asserts that LTSU is a "disciplinary" status, the LTSU Level 2 is a unique kind of segregation with characteristics of both disciplinary and administrative segregation. Inmates come to LTSU because of "unacceptable behaviors" in other institutions, but they have not all been adjudicated by a hearing officer to have violated the DOC's rules. (App. 95) The LTSU is not a place where inmates are sent for a discrete period of punishment, pursuant to a specific infraction, but is a p'ace for "Long Term" segregation of the most incorrigible and difficult prisoners for as long as they fall under that umbrella.

All LTSU inmates must spend 90 days at Level 2 status when they first arrive, and although their behavior will be reviewed every 30 days to determine whether they deserve promotion to Level 1, that determination is entirely within the discretion of prison administrators and is not linked to any particular infraction or compliance. While disciplinary segregation ordinarily has a specified duration, inmates may remain in Level 2 and under the publication ban

indefinitely.[8] In fact, several inmates have remained in Level 2 since the LTSU's inception two years ago. As administered, it is unclear how the policy would achieve the deterrence it seeks. Not only is the rehabilitation justification illogical given the nature of LTSU confinement, but LTSU Level 2 is a far cry from the disciplinary contexts in which such bans have been deemed constitutional.

Furthermore, the DOC has offered no evidence that the rule achieves or could achieve its stated rehabilitative purpose. In *Waterman*, the DOC submitted affidavits from two psychologists who testified that pornographic materials threatened to thwart the effectiveness of the treatment given to sex offenders and who agreed that limiting access to such material was a sensible rehabilitation strategy. 183 F.3d at 215. In *Guajardo*, the defendants offered evidence as to the frequency and percentage of solitary confinements in the Texas Department of Corrections ("TDC") which showed that the negative perception of solitary confinement had a deterrent effect. 568 F.Supp. at 1368 ("a significant majority of TDC inmates

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[8] In fact, disciplinary segregation is usually quite short in duration. In *Daigre*, after addressing a guard profanely, Daigre was put in "administrative and punitive lockdown" for "a maximum of 10 days' isolation" pursuant to a finding of "defiance." 719 F.2d at 1311. In *Gregory*, the challenged policy was in place for inmates on Disciplinary Detention Status, which carried with it a 60-day maximum duration. 768 F.2d at 290. In *Guajardo*, the court was evaluating a publication ban in place in solitary confinement, a type of punitive segregation used as a sanction for violation of Texas Department of Corrections rules and regulations. An inmate could be confined in solitary for a maximum of 15 days, and an interval of at least three days was required between terms in solitary, during which time the inmate could have access to any publications withheld during the term. 568 F.Supp. at 1366.

have never experienced solitary confinement and less than half of those who are confined in solitary return a second time"). Here, there are *no* such supporting affidavits. The District Court presumably relied on Superintendent Dickson's testimony that the prohibition in question "gives us a means or method to say you comply, you modify your behavior, and you can obtain these things, these privileges," and his explanation that "we're very limited . . . in what we can and cannot deny or give to an inmate, and these are some of the items that we feel are legitimate as incentives for inmate growth." (App. 110) The District Court did not examine the fit between the policy and its rehabilitative goals, whether the ban was implemented in a way that could modify behavior, or inquire into whether the DOC's deprivation theory of behavior modification had any basis in real human psychology, or had proven effective with LTSU inmates. At oral argument, counsel for the DOC said it was a "hope." In fact, Banks argues that contrary to the assertions of the prison authorities and the District Court, isolating prisoners from the going-on in the outside world tends to undercut any genuine rehabilitation. There is, again, no evidence in the record on this point, but Banks cites to language in several cases to support this assertion.[9] It certainly seems relevant to the above inquiry, as well

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[9] Rehabilitative goals are "furthered by efforts to inform and educate inmates, and foster their involvement in the world outside the prison gates." *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1034 (2d Cir. 1985). In *Spellman v. Hopper*, there was testimony that deprivation of reading materials in segregation can cause "psychological deterioration" which in turn can cause inmates either to be "very withdrawn and curl up in infancy, or [to] become acting out and aggressive people." 95 F.Supp.2d at 1281; *see also Morrison v. Hall*, 261 F.3d 896, 904 n.7 (9th Cir. 2001) (citing studies and articles noting the "correlation between reading, writing and inmate rehabilitation").

as likely, that the ban may produce less rather than more compliance in at least some inmates.[10]

2. Security

With respect to security, the District Court held that there was a valid rational connection between the ban on periodicals and photographs in LTSU Level 2 and the constellation of security concerns put forth by the DOC. We cannot conclude from the record that such a connection exists. This is so for two reasons.

First, there is no evidence in the record of the misuse of periodicals or photographs in any of the ways described by the DOC. In fact, matches are not allowed in the LTSU. *See also Gregory*, 768 F.2d at 289 ("cellblock fires have been eliminated entirely . . . by new regulations prohibiting inmates from possessing matches"). There was no testimony as to the frequency of fires in the LTSU, nor testimony about any particular fires, in or out of LTSU segregation, and how and with

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[10] Our dissenting colleague contends that we misapply the first *Turner* factor by requiring the DOC to show some evidence to support its contention that the rule achieves or could achieve its stated rehabilitative purpose. However, our insistence that the DOC offer some evidence is not, in our view, at odds with *Turner* but rather a complementary part of the analysis in determining whether an asserted goal is logically connected to the prison regulation. *See Turner*, 482 U.S. at 89 (requiring prison authorities to put forward a legitimate governmental interest justifying the regulation). Indeed, in *Turner*, the Supreme Court evaluated the evidence in determining whether the prison rules in question served – in theory or in practice – the alleged penological goals. *See id.* at 91-93, 98-99. In our view, the paucity of any such evidence in this matter reinforces the conclusion that there is no valid, rational connection between the DOC rule and its stated rehabilitative purpose.

what materials they were set and fueled.[11] The same is true for the materials' potential use as weapons.

Furthermore, there was no testimony as to the effect such a ban has had on the frequency of fires, be it in the LTSU or elsewhere. In fact, Banks points out that inmates on Death Row, in Administrative Custody, and in the Special Management Unit are routinely permitted to have these items, and the DOC presented no evidence that the security or operations of these units are negatively affected to any palpable degree by the presence of these items.

The District Court dismissed this argument, agreeing with the DOC that a comparison to other forms of segregation within the Pennsylvania DOC is irrelevant because LTSU inmates are the "worst of the worst." However, there is no evidence before us to indicate that what sets these inmates apart from the rest is their misuse of non-legal or non-religious periodicals. The District Court's conclusion that "the fact that other segregated inmates have not created the same security concerns while in possession of newspapers and magazines is one reason they are in those units and not in the LTSU" is an inference that finds no support in the record. In fact, there is no indication in the record that any LTSU inmates were transferred there because they had created a security risk with periodicals or photographs. The LTSU inmates are certainly and unquestionably incorrigible, but whether their incorrigibility takes the form described by the District Court is an open question

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[11] Superintendent Dickson testified only that within the last six months there were "no more than two or three" cell fires in the entirety of the LTSU, and "paper products generally are the way it's first ignited." He also testified that he did not know of any instance where a LTSU Level 1 inmate used a newspaper or magazine to start or fuel a fire. (App. 112)

which cannot be resolved at the summary judgment stage by making inferences in favor of the DOC and without support in the record.

Second, we agree with Banks that given the materials Level 2 inmates are permitted in their cells, prohibiting a single newspaper or magazine has no significant relationship to the stated security objectives. There are many other non-prohibited means for the inmates to fuel fires, hurl waste, conceal contraband and create weapons. Under current regulations, each inmate is given a jumpsuit, a blanket, two bedsheets, a pillow case, a roll of toilet paper, a copy of a prison handbook, ten sheets of writing paper, several envelopes, carbon paper, three pairs of socks, three undershorts and three undershirts, and may at any point also have religious newspapers, legal periodicals, a prison library book, Bibles, and a lunch tray with a plate and a cup. Many of these items are flammable, could be used for the above purposes as effectively as a newspaper, magazine or photograph, and have been so used by LTSU Level 2 inmates.[12] The District Court again agreed with the DOC that the prohibition may not eliminate but certainly reduces the security risks with which the DOC is concerned, and that it is irrelevant that the policy does not absolutely prevent the harms it addresses because *Turner* is not a "least-restrictive-alternative" test. *Fraise*, 283 F.3d at 520; *Waterman*, 183 F.3d at 219.

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[12] In his deposition, Superintendent Dickson testified not only that under the challenged policy there have still been cell fires and rashes of feces-flinging in LTSU level 2, but also that inmates can and do use other permitted materials to create these disturbances: "Oftentimes it's with the cups that they're given for their drinks, things like that . . . .a piece of paper or whatever . . . that they can use to give a little leverage and fling the materials." (App. 112)

Although the District Court is correct that the policy need not be narrowly tailored to the harm it addresses to pass constitutional muster, its conclusion here has some flaws. Even if the policy need not be "narrowly tailored" to the stated interests, if the prohibition of newspapers, magazines and photographs has only a minimal effect on security in the LTSU because of the other materials that they are permitted in the cells, the relationship between the policy and the penological interest may be too attenuated to be reasonable.[13] It is important to note here that the inmates are not requesting unlimited access to innumerable periodicals but for the ability to have one newspaper or magazine and some small number of photographs in their cells at one time. We fail to see how the DOC could have reasonably thought that the challenged policy, which permits an inmate to have in his cell 10 sheets of writing paper and one records center box full of legal or religious periodicals or texts, would meaningfully

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[13] *See Spellman*, 95 F.Supp.2d at 1278; *Jackson v. Elrod*, 671 F.Supp. 1508, 1511 (N.D. Ill. 1987) *aff'd*, 881 F.2d 441 (7th Cir. 1989) (admission that hardcover books are no greater a risk to conceal contraband than, for example, clothing, paperbacks, mattresses and light fixtures, "disproves defendant's assertion of a rational connection between their hardcover book ban and a governmental interest"); *Mann v. Smith*, 796 F.2d 79, 82-83 (5th Cir. 1986) (ban on newspapers and magazines represents exaggerated response to legitimate need to preserve discipline and maintain security); *Kincaid v. Rusk*, 670 F.2d 737, 744 (7th Cir. 1982) (total ban on newspapers unjustifiable when hazards of newspaper possession could as well be caused by reading material detainees were permitted to have); *Payne v. Whitmore*, 325 F.Supp. 1191, 1193 (N.D.Cal. 1971) ("Jail cells are already filled with an abundance of materials quote suitable for fire starting . . .; yet no one suggests that cells ought to be stripped of bedding, clothing, toilet paper, writing materials, and so on.").

improve prison security by forbidding him one copy of the *Graterfriends* prison newsletter.[14]

The District Court asserted that the prohibited materials are "more likely" to be used to create a security concern and are "most easily and commonly used as weapons or to set fires and fling feces" than religious or legal materials, and therefore the .link between the policy and the stated interest is more than tenuous. (App.125) However, nowhere in Dickson's affidavit does he describe specific incidents where the prohibited materials were used in any manner posing a security risk by LTSU inmates before or after they were transferred to LTSU. He articulates his belief that periodicals are more well-suited to create particular weapons, but admits that the items already in inmates' cells certainly could and have been used to fuel fires, hide contraband, fling feces and create weapons. (App.112)

C. Factor two: Means for exercising the burdened right

Under this factor, we are asked to "focus on the burden that the regulation imposes on an inmate's ability to engage in constitutionally protected activity." *DeHart v. Horn*, 227 F.3d 47, 53 (3d Cir. 2000) (en banc). If other avenues are open for the inmate to exercise the right in question, the court should exhibit deference to the judgment of corrections officials, while if no other avenues are available, the inmate's right is

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[14] In a memo dated February 8, 2001, and distributed to LTSU inmates, Superintendent Dickson stated that the publication *Graterfriends* is a newsletter, not legal mail, and therefore denied to Level 2 inmates. *Graterfriends* is a Pennsylvania-based newsletter published under the auspices of The Pennsylvania Prison Society to which prisoners contribute and which is distributed to prisoners and other members of the corrections community.

given greater weight in the Turner balancing process. *Id.*[15]

Banks argues that while Level 2 inmates can read leisure books, they have no meaningful access to current news accounts or published information about current political, social, or other public events and activities occurring outside the prison walls, and they have no way to look at images of loved ones and friends apart from the possibility of infrequent visits. The District Court, however, disagreeing with Banks, found that inmates had sufficient means to engage in the constitutionally-protected activities.

The District Court characterized the periodicals ban as "not a blanket prohibition" because Level 2 inmates can qualify by good conduct to be promoted to LTSU Level 1. The District Court's justification for this determination is its explanation that "each of these prisoners has the option of modifying his behavior and being promoted to a less restricted environment where access to newspapers magazines and photographs may be enjoyed." (App. 126) As the DOC elaborated in its brief, "there is no reason to suppose that a prison administration would not respond favorably to a prisoner's initiative to qualify for relief from the ban on periodicals or photos through exhibiting good behavior."

The District Court and the DOC are correct in noting that inmates can be promoted from Level 2 to Level 1 and, if they are, they will gain access to the prohibited materials. However, that does not change the fact that the prohibition is indeed a "blanket" one,

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[15] Although this inquiry depends in part on how the scope of the constitutional right is defined, neither the parties nor the District Court define the right in question, nor does the District Court's analysis depend on a particular understanding of the rights in question.

and that as long as an inmate is at Level 2 status and is subject to the policy in question, he has no alternative means to exercise his First Amendment right of access to a reasonable amount of newspapers, magazines, and photographs.

Moreover, there is no reason to infer that the process of "promotion" from Level 2 to Level 1 is as much under the inmates' control as the DOC and the District Court characterize it. As noted above, segregation in Level 2 is not linked to a particular infraction, and is of potentially unlimited duration. Any inmate who enters LTSU will remain at Level 2 for 90 days no matter how he modifies his behavior. Furthermore, the only information in the record as to how the process works is the following explanation from Dickson's deposition:

> You know, you have the ability through your own actions to be promoted, if you will, from a level 2 inmate to a level 1 inmate, and we do that every day. We have a system where the unit management team reviews each inmate's progress every thirty days. The unit management team is made up of the unit manager, custody staff, psych staff, nursing staff. And we try to give and provide every inmate every opportunity to progress through this system and to be able to obtain the privileges. (App. 110)

There are no affidavits in the record from any of those decision-makers mentioned by Dickson, nor is there any documentation of the review process. Although at Dickson's deposition, Banks' attorney apparently examined and requested some documents which indicated, with respect to current LTSU inmates, how long they had been at the facility and how long

they had been at Level 2, those documents are also not in the record. Again, unlike the policies in solitary and disciplinary confinement examined in *Daigre*, *Gregory*, and *Guajarde*, the LTSU prohibition cannot be characterized as merely a "time, place or manner" restriction. *See, e.g.*, *Gregory*, 768 F.2d at 290 ("[the policy is] not directed at what mail an inmate could receive, but only at when he could receive it").

D. Factors Three and Four: Accommodation

We now consider the District Court's analysis of *Turner's* third and fourth factors. Under these factors, we must determine whether the right in question can be accommodated without significant negative consequences in terms of efficiency and security, *DeHart*, 227 F.3d at 58, and "whether the prison can easily serve its interests with alternative means without infringing upon the rights of prisoners," *Crofton v. Roe*, 170 F.3d 957, 959 (9th Cir. 1999). The Supreme Court has suggested that the "existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns." *Thornburgh v. Abbott*, 490 U.S. 401, 418 (1989) (citation and quotations omitted).

In *Fraise*, inmates challenged a policy which authorized prison authorities to designate and transfer core members of "Security Threat Groups" as violative of the First Amendment's Free Exercise Clause, as well as the Equal Protection and Due Process Clauses.[16] The Court determined that the third prong weighed in

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[16] A Security Threat Group ("STG") is a group of inmates, designated by the Commissioner, which "poses a threat to the safety of staff, other inmates, the community, and/or damages to, or destruction of property, and/or interrupting the safe secure and orderly operation of the correctional facility(ies)." *Fraise*, 283 F.3d at 509.

favor of the DOC and, quoting *Turner*, stated that "[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Fraise*, 283 F.3d at 520 (quoting *Turner*, 482 U.S. at 90). It is certainly supported by the record, as the District Court repeatedly asserted, that the LTSU Level 2 inmates are some of the most "intractable" in the Pennsylvania prison system. We cannot agree, however, on the record before us, that accommodation of those prisoners' rights by giving them reasonable access to a limited number of periodicals and photographs would have such a "ripple effect."

At no point does Banks propose that Level 2 inmates be allowed unmitigated and unregulated access to all periodicals. Rather, Banks proposes, and the District Court discussed, two alternative policies which would accommodate the prisoners' rights. First, the DOC could establish a specific reading period, or several different reading periods, in which guards deliver a single newspaper or magazine to an inmate's cell, if requested, and retrieve it at the close of the period. The DOC could easily control the number of periodicals in his cell at one time, the frequency of the distributions, the amount of time any inmate would be in possession of the materials, as well as the number of inmates who would have periodicals in their cells at any one time.[17] The DOC could also limit the total number of photographs a Level 2 inmate could have in his cell at one time to what they consider a reasonable number. In conjunction with this policy, access to periodicals could be entirely withheld from those individual

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[17] Volume control is a well-recognized alternative to the blanket exclusion of items protected by the First Amendment. *See Clement v. California Dept. of Corrections*, 220 F.Supp.2d 1098, 1113 (N.D.Cal. 2002); *Spellman*, 95 F.Supp.2d at 1286.

prisoners who, in the judgment of prison officials, *would* pose a particular risk given their records, or those inmates who *have* abused their use of periodicals or photographs. The DOC asserts that such a limited restriction would not prevent Level 2 inmates from using the materials to start fires, fling feces and create weapons and therefore, during the reading period, extra monitoring of cells would be required, thus affecting the prison's resources and possibly the safety of other inmates.

We fail to see, however, as discussed above under factor one, how an inmate's hour-long possession of *Graterfriends* would require further monitoring when at any time that inmate may be in possession of 10 sheets of writing paper, and as many copies of the Watchtower, the Jewish Daily Forward, and the Christian Science Monitor Magazine as can fit in a records center box. As discussed above, the District Court's assumption that prisoners would be more reluctant to use religious materials for such nefarious purposes is unsupported by the record. Furthermore, at any point, the entire LTSU can house no more than 40 inmates, one-tenth of one percent of the state's prison population. (App. 95) Even if limited distribution of periodicals were to require additional monitoring, such an accommodation would have a minimal impact on prison resources.

Alternatively, individual prisoners could be escorted to the secure mini-law library to read a periodical of their choosing. Again, the District Court found that such an accommodation would intensify security concerns by increasing the amount of inmate movement and thereby placing a formidable burden on LTSU staff.[18] Inmates are already permitted to leave

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[18] Here, the District Court relies on *Allah v. Al-Hafeez*, 208 F.Supp.2d 520, 530 (E.D.Pa. 2002), in which the court found

their cells under guard escort to use the library to view legal materials, so individual inmate escort has not been deemed prohibitively burdensome or dangerous by prison administrators. Although it is possible that the *demand* for mini-law library sessions may increase if the policy were changed, the DOC has not shown how this would significantly increase the burden on prison staff. Superintendent Dickson explained in his deposition that under current LTSU policy, one inmate is allowed out of his cell at a time to visit the law library for one two-hour session. A roster of requests, like a waiting-list, is maintained and fulfilled on a first-come first-serve basis. The amount or frequency of inmate movement is already regulated. If the inmates' rights to read other periodicals were accommodated, that would not change. We fail to see how the mere addition of non-legal and non-religious periodicals to the materials already available to the inmates in the library would create the "ripple effect" cited by the DOC. In short, the DOC has not shown that a change in the publication ban would mean "significantly less liberty and safety for everyone else, guards and other prisoners alike." *Abbott*, 490 U.S. at 418 (quoting *Turner*, 482 U.S. at 92).

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that the third *Turner* factor weighed in the prison authorities' favor because the inmate was particularly ill-behaved and accommodating his presence at religious services would require more monitoring of those services, thereby straining prison resources and affecting the prison staff and other inmates. Although the *Turner* factors are evaluated independently, it is important to note with respect to this decision that the prison policy was much narrower and the court's analysis was informed by the fact that the inmate had many meaningful ways to practice his religion without attending services. He could meditate, pray and study his religion, as well as discuss it with other inmates outside his cell. *Id.*

Finally, the District Court asserted that the alternatives proposed come at more than a *de minimus* cost to the DOC's behavior modification goals because the accessibility of periodicals would render the threat of Level 2 segregation toothless as a deterrent. However, the District Court overlooked the extent to which, even without the challenged restriction, Level 2 LTSU segregation is more restrictive than Level 1 in significant respects. For example, Level 1 inmates are permitted two family visits and one fifteen minute telephone call per month. They are also permitted to spend $5.00 per week at the commissary on items defined by the Unit Team. Additionally, while inmates at both levels received in-cell counseling and visits from chaplains, and can be employed as Unit Janitor, only Level 1 inmates receive compensation as per DC-816 Inmate Compensation System, and only Level 1 inmates are permitted GED and Special Education in-cell study. (App. 32)

IV. Conclusion

For the reasons stated above, we believe that the DOC's policy that prohibits inmates confined in the LTSU at Level 2 status access to photographs, and all newspapers and magazines which are neither legal nor religious in nature, cannot be supported as a matter of law by the record in this case. Accordingly, the summary judgment of the District Court will be reversed and the case remanded for further proceedings consistent with this opinion.

ALITO, Circuit Judge, dissenting:

At issue in this case are restrictions that the Pennsylvania Department of Corrections imposes as a last resort on the most disruptive and dangerous .1% of its prison population. These restrictions apply only as

long as an inmate remains in Level 2 of the LTSU, an assignment that may terminate after as little as 90 days. The question before us is whether these temporary, last-resort restrictions are facially unconstitutional under the standard set out in *Turner v. Safley*, 482 U.S. 78 (1987), a standard that instructs courts to extend considerable deference to judgments of correctional officials. Because I believe that the majority has misapplied *Turner*, I must respectfully dissent.

Under *Turner*, prison regulations that restrict constitutional rights must be sustained if they are "reasonably related to legitimate penological interests." 482 U.S. at89. *Turner* noted four factors to be considered in determining whether the requisite reasonable relationship exists: (1) whether there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates"; and (4) whether there are "ready alternatives" to the challenged regulation." *Id.* at 89-90 (citation omitted). I will address each factor.

First factor: Rational relationship between regulation and legitimate penological interests. I agree with the District Court that this factor weights in favor of the constitutionality of the challenged regulations because there is a "rational" relationship between that restriction and the legitimate penological objective of deterring misconduct. It is "rational" for corrections officials to think that inmates who are not in Level 2 will be deterred from engaging in serious misconduct because they do not want to be transferred to that unit and thus to be subjected to the restrictions that accompany that assignment. It is also "rational"

for corrections officials to think that inmates who are in Level 2 will be deterred from engaging in serious misconduct while in that unit because they with to be transferred out and thus to escape such restrictions.

The majority disagrees with these conclusions for two reasons. First, the majority apparently believes that a sanction cannot deter unless a potential violator knows with some specificity the type misconduct that will result in the imposition of the sanction and the length of time that the sanction will last. The majority concedes that "deterrence of future infractions of prison rules can be an appropriate justification for temporarily restricting the rights of inmates" and that other courts of appeals have sustained rules restricting the receipt of newspapers by prisoners in disciplinary segregation. *See* Maj. At 9 (citing *Gregory v. Auger*, 768 F.2d 287, 290 (8th Cir. 1985); *Daigre v. Maggio*, 719 F.2d 1310, 1313 (5th Cir. 1983)). The majority finds these precedents inapplicable because the "LTSU is not a place where inmates are sent for a discrete period of punishment, pursuant to a specific infraction, but a place for 'Long Term' segregation of the most incorrigible and difficult prisoners for as long as they fall under that umbrella." *Id.*

The majority's reasoning is unsound. The uncertainties noted by the majority may diminish the deterrent effect of the regulations on some inmates who are not yet in Level 2, but there is no reason to think that these uncertainties entirely eliminate the deterrent effect of the regulations on the general prison population. Similarly, it is rational to believe that the challenged restrictions provide an incentive for those inmates who are already in Level 2 to refrain from disruptive behavior in the hope of obtaining a transfer out of the unit. Again, uncertainty about what must be done to obtain such a transfer or about when such a transfer may be available may have an impact on the

degree of the incentive, but there is no reason to suppose that the incentive is wholly destroyed.

Second, the majority concludes that the regulations are not rationally related to the goal of deterring misconduct because "the DOC has offered no evidence that the rule achieves or could achieve its stated rehabilitative purpose." Maj. Op. at 10. In taking this approach, the majority misconstrues the nature of the fist *Turner* factor. This factor requires us to determine whether there is a "*logical connection* between the regulation and the asserted goal," see 482 U.S. at 89 (emphasis added), not whether there is empirical evidence that the regulation in fact serves that goal. The entire system of prison discipline might be imperiled if each sanction for prison misconduct could not be sustained without empirical evidence that the sanction provided some incremental deterrent.

Second factor: alternative means of exercising the right. This is the most troubling of the four factors, but I do not think that it is sufficient to support the majority's conclusion that the regulations are facially unconstitutional. The regulations impinge upon the right to receive information about current events and communications (in the form of photographs) from family members and friends, but the restrictions are not absolute. Inmates in Level 2 may still read books from the prison library and may receive letters. Moreover, as the District Court noted, inmates in Level 2 have the "option of modifying their behavior and being promoted to a less restricted environment." Report & Recommendation at 8. An as-applied challenge by an inmate subjected to lengthy confinement in Level 2 despite a record of reformed behavior would present different considerations, but the majority's opinion is not limited to such a case.

Third and fourth factors: Availability and impact of accommodation. The majority proposes modifications in prison policies that would almost certainly have an impact on prison resources. The majority first suggests that guards could deliver requested newspapers and magazines to inmates' cells and then retrieve these materials after the expiration of a specified "reading period." Maj. Op. at 18. Providing this service for each of the 40 inmates in Level 2 would be time consuming. "Alternatively," the majority states, "individual prisoners could be escorted to [the] secure mini-law library to read a periodical of their choosing." Maj. Op. at 19. This service, however, would undoubtedly impose a significant burden, particularly since the inmates in question are those whom the Department of Corrections has classified as the most violent and disruptive. It is Department policy that Level 2 inmates may not be transported from their cells unless they are placed in hand and leg irons and are escorted by two officers.

Taking into account all four of the *Turner* factors, I conclude that the challenged regulations are not facially unconstitutional. On their face, these regulations are reasonably related to the legitimate penological goal of curbing prison misconduct, and I would therefore affirm the decision of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1245

RONALD BANKS, et al.

Appellants

v.

JEFFREY BEARD

On Appeal from the United States District Court
for the Western District of Pennsylvania

District Court Judge: The Honorable Terrence F. McVerry
(D.C. No. 01-cv-1956)

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, SMITH, VAN ANTWERPEN and [19]ROSENN, Circuit Judges

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The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court

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[19] Judge Rosenn's vote is limited to panel rehearing only.

and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED. Chief Judge Scirica, Judge Nygaard, Judge Alito, Judge Barry and Judge Van Antwerpen would have granted rehearing en banc.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: March 22, 2005
CLC/cc: Jere Krakoff, Esq.
Kemal A. Mericli, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD BANKS, for himself and on behalf of all similarly situated prisoners who are confined or will be confined in Long Term Segregation Units of State prisons located in the Western Judicial District of Pennsylvania Plaintiffs	)	
v.	)	Civil Action No. 01-1956
JEFFREY BEARD, in his official Capacity as Secretary of the Pennsylvania Department of Corrections Defendant.	)	

MEMORANDUM ORDER

AND NOW, this 10th day of January, 2003, after the plaintiff, Ronald Banks, filed an action in the above-captioned case, and after cross motions for summary judgment were submitted by the parties, and after a Report and Recommendation was filed by United States Magistrate Judge Robert C. Mitchell (*Document No. 25*) granting the parties ten days after being served with a copy to file written objections thereto, and upon consideration of the objections filed by plaintiff (*Document No. 26*), which the Court notes were virtually identical to the arguments made by plaintiff in his brief in support of summary judgment and said arguments were previously given due consideration by the Magistrate Judge, and upon independent review of the motions and the record, and upon consideration of the

Magistrate Judge's Report and Recommendation, which is adopted as the opinion of this Court,

It is ORDERED, ADJUDGED, AND DECREED that defendant's motion for summary judgment (*Document No. 16*) is GRANTED and plaintiff's motion for summary judgment (*Document No. 20*) is DENIED. .

It is further ORDERED that final judgment of this Court is entered pursuant to Rule 58 of the Federal Rules of Civil Procedure.

/s/ Terrence F. McVerry
Terrence F. McVerry, Judge
United States District Court

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD BANKS,	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 01-1956
	)	
JEFFREY BEARD,	)	
Defendant.	)	

REPORT AND RECOMMENDATION

I. Recommendation

It is respectfully recommended that the motion for summary judgment submitted on behalf of defendant (Docket No. 16) be granted, and plaintiffs' motion for summary judgment (Docket No. 20) be denied.

II. Report

Presently before this Court for disposition are cross motions for summary judgment.

Plaintiff Ronald Banks commenced this action under 42 U.S.C. § 1983, on behalf of himself and other similarly situated prisoners alleging that defendant's policy denying certain segregated inmates access to newspapers, magazines and photographs is violative of their First Amendment rights.

The record demonstrates that the Department of Corrections has established a Long Term Segregation Unit ("LTSU") at the State Correctional Institution at Pittsburgh ("SCIP") to house inmates that are "the most incorrigible, the most difficult, problematic, and have

demonstrated the most behavior conflicts."[20] The purpose of creating the LTSU is to ensure the safety and security of the Department and to promote behavioral changes in the inmates assigned there.[21] The LTSU population presently consists of approximately forty inmates and constitutes approximately one tenth of one percent of the entire prison population in the state system.[22] The LTSU is the most restrictive in the State and policy permits only one inmate out of his cell at a time who must then wear hand and leg restraints and must be escorted by two correctional officers.[23] Each inmate coming into the LTSU spends a minimum of ninety days on "Level 2" where they are prohibited from having newspapers, magazines or photographs in their cells.[24] Nor do Level 2 inmates have access to the prison library where newspapers and magazines subscribed to by the prison are held. Moreover, they may only receive news clippings in the mail if they have some connection to the inmate.[25] As such, any magazines, newspapers or photographs in the inmates possession when he is transferred to the LTSU are placed in storage and any such materials subsequently found in an inmate's possession are considered contraband and

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[20] Deposition of Deputy Superintendent Joel Dickson ("Dickson Depo."), pp. 25-26, 28, 92. A copy of Mr. Dickson's deposition transcript has been submitted by defendant as Appendix A (Docket No. 19).

[21] *Id.* at 24-25.

[22] *Id.* at 17, 25.

[23] *Id.* at 89.

[24] *Id.* at 18-19, 46-48, 68-70.

[25] *Id.* at 46-48.

confiscated.[26] Indeed, the only reading material that Level 2 inmates are permitted to have are paperback books that they can order from the library.[27]

After the initial ninety-day period, correction officials review each inmate's progress every thirty days to determine whether their behavior warrants a promotion to Level 1 where the inmates are permitted to have an ordinary general circulation newspaper in their cell and up to five magazines that may be exchanged on a one-for-one basis.[28] Presently, approximately three of the thirty-nine inmates held in the LTSU are on Level 1.[29]

Deputy Superintendent Joel Dickson, who supervises the LTSU at SCIP, testified at his deposition that these prohibitions serve several penological purposes. First, it promotes behavior modification. Defendant's position is that by ameliorating the prohibitions for Level 1 inmates and virtually eliminating them for the general prison population, it encourages the most difficult prisoners to not only become integrated into the general population but, upon release, to be a more productive citizens. Second, according to Deputy Dickson, the policy promotes security as the less property these inmates have in their cells the more difficult it is for them to conceal contraband. As well, it minimizes the materials available to these inmates that can be used to create harm either to themselves or to others.[30] In this regard, Dickson testified that newspapers and magazines can

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[26] *Id.* at 48, 50-51, 71.

[27] *Id.* at 91.

[28] *Id.* at 20, 55-56, 88.

[29] *Id.* at 17.

[30] *Id.* at 85-88.

be rolled up and used as blow guns and spears, used to fling feces and urine at the guards, or used as tinder for cell fires.[31]

Plaintiff Banks filed the instant complaint on October 18, 2001, on behalf of himself and other similarly situated prisoners alleging that defendant's policy prohibiting Level 2 inmates from maintaining magazines, newspapers and photographs in their cells violates the free speech component of the First Amendment to the United States Constitution. Plaintiff seeks equitable and declaratory relief as well as the issuance of preliminary and permanent injunctions. A Motion for Class Certification was also filed by plaintiff on January 14, 2002, and, unopposed by defendant, was granted on March 22, 2002.[32]

The parties have now filed cross motions for summary judgment. Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). *See Marzano v. Computer Science Corp.*, 91 F.3d 497, 501 (3d Cir. 1996) In deciding a motion for summary judgment the court must view all inferences in a light most favorable to the non-moving party. *Id.*, citing *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994). The non-moving party, however, may not rely on bare assertions, conclusory allegations or mere suspicions to support its claim but must demonstrate by record evidence the meritorious nature of the claim. *Orsatti v. New Jersey*, 71 F.3d 480, 484 (3d Cir. 1995).

The law is not in dispute. In an effort to balance an inmate's right to maintain his or her Constitutional

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[31] *Id.* at 85-88, 91-92.

[32] *See* Docket Nos. 9 and 10.

protections within the prison setting and the necessity of limiting those rights by prison officials in order to accommodate the demands of managing a prison, the United States Supreme Court has held that a prison policy that intrudes on an inmate's constitutional rights will nevertheless be upheld "if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987) ("*Turner*"). *See Fraise v. Terhune*, 283 F.3d 506, 515 (3d Cir. 2002) ("*Fraise*"). As reiterated by the Court of Appeals for the Third Circuit, *Turner*, requires a court to weight four factors in determining whether this standard has been met:

> [F]irst, whether the regulation bears a "valid, rational connection" to a legitimate and neutral governmental objective; second, whether prisoners have alternate ways of exercising the circumscribed right; third, whether accommodating the right would have a deleterious impact on other inmates, guards, and the allocation of prison resources generally; and fourth, whether alternatives exist that "fully accommodate[] the prisoner's rights at a de minimis cost to valid penological interests."

Fraise v. Terhune, 283 F.3d at 513-14, quoting *Turner v. Safley*, 482 U.S. at 91. Although these factors are merely guidelines by which to evaluate the reasonableness of prison regulations "'the first fact looms especially large,' because it 'tends to encompass the remaining factors, and some of the criteria are apparently necessary conditions.'" *Waterman v. Farmer*, 183 F.3d 208, 213-14 (3d Cir. 1999), quoting *Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998), *cert. denied*, 527 U.S. 1035 (1999). Moreover, where the regulation at issue implicates prison security, particular deference should be accorded to prison

authorities. *Fraise v. Terhune*, 283 F.3d at 516, relying on *Turner v. Safley*, 482 U.S. at 84-85.

Here, as previously discussed, defendant contends that the policies at issue serve the penological interests of furthering prison security and encouraging compliant behavior in particularly disobedient and rebellious inmates.[33] Plaintiffs do not appear to challenge the legitimacy of these governmental objectives but rather contend that there is no rational connection between these objectives and the policy of prohibiting Level 2 inmates to have newspapers, magazines and photographs in their cells.[34]

Specifically, with respect to the prison's interest in encouraging compliant behavior, plaintiffs argue that rehabilitative goals are only furthered by maintaining contact with the outside world and that isolating these inmates from such contact is therefore counter productive. As well, plaintiffs contend that because the LTSU invokes other compelling rehabilitation incentives that the additional inducements of prohibiting newspapers, magazines and photographs are only marginally worthwhile.

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[33] We note here that defendant does not dispute that the policies at issue infringe on plaintiffs' First Amendment rights in the first instance but argue that they should nevertheless be upheld because they are reasonably related to legitimate penological interests.

[34] Although defendant has challenged whether plaintiffs have exhausted administrative review of the policy against photographs, plaintiffs have submitted documentation which suggests that they have. *See* Plaintiffs' Reply to Defendant's Motion for Summary Judgment (Docket No. 23). As such the issue is properly considered by the Court. *See Ahmed v. Dragovich*, 297 F.3d 201, 209 n.9 (3d Cir. 2002); *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532, 534-37 (7th Cir. 1999).

The difficulty with plaintiffs arguments, in our view, is that having newspapers and magazines available to them while in the general population or the Special Management Unit apparently did nothing to further their rehabilitation or they wouldn't now be in the LTSU. Indeed, plaintiffs are in the LTSU because efforts in other units failed thus already proving themselves to be the most incorrigible, the most difficult, and the most problematic prisoners.[35] Having consequently been transferred to the LTSU, it seems not only rational to impose more restrictive conditions in an effort to encourage compliant behavior but imperative to the success of the LTSU.

Plaintiffs also argue that defendant's security objectives are not rationally related to the prohibition of newspapers, magazines and photographs since there are other means available to these prisoners to start fires, hurl waste, conceal contraband and create weapons. The fact that the policy does not completely eliminate the opportunity for these inmates to create security concerns, however, does not, in our view, render the policy unrelated to those concerns or negate the prison's interest in minimizing the prisoners' access to materials that are most easily and commonly used as weapons or to set fires and fling feces. Indeed, it appears less likely that an inmate would use their bedding, clothes, legal and religious papers to start fires or fling feces than the daily newspaper.

Moreover, of primary concern is the use of the prohibited items as blow guns and spears for which magazines and newspapers, given their ability to be rolled, are ideal.[36] Plaintiffs nevertheless argue that the

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[35] *See* Dickson Depo. at 25.

[36] Dickson Depo. at 91, 93.

relationship between the policy and this objective is too tenuous to pass constitutional muster as evidenced by the fact that other dangerous and problematic inmates housed in other segregated units do not have the same restrictions imposed upon them. While it may be true that prisoners in the Special Management Unit and Administrative Custody enjoy some access to newspapers and magazines, Deputy Superintendent Dickson testified that should they show a propensity to use them as weapons or to set fires and fling feces that they too "would be on their way to the LTSU."[37] Thus, it appears that the inmates in the other segregated units do not present the same security concerns as those in the LTSU and the fact that they have access to the materials utilized by LTSU inmates as weapons does not serve to sever the connection between the prohibition at issue and prison security.

Because the record appears to support a finding that the policy denying Level 2 inmates access to newspapers, magazines and photographs bears a valid and rational connection to legitimate prison objectives, the first *Turner* factor appears to weigh in defendant's favor.

Similarly, it appears clear that the second factor – whether these inmates have an alternative way of exercising their constitutionally protected rights – also weighs in defendant's favor. Significantly, the prison's policy denying plaintiffs access to the cited articles is not a blanket prohibition. To the contrary, each of these prisoners has the option of modifying their behavior and being promoted to a less restricted environment where access to newspapers, magazines and photographs may be enjoyed. Moreover, it appears that Level 2 inmates are able, albeit on a limited basis,

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[37] Dickson Depo. At 92.

to visit with loved ones and are able to carry on a correspondence.[38]

The third factor appears to weigh in favor of the prison's policy as well. This prong of the *Turner* test obligates the court to consider the effect that accommodating the right would have on fellow inmates, prison staff and on the allocation of prison resources. *Fraise v. Terhune*, 283 F.3d at 520; *DeHart v. Horn*, 227 F.3d 47, 57 (3d Cir. 2000).

In *Fraise v. Terhune, supra*, a group of inmates brought suit alleging that the prison policy which authorizes prison officials to designate and transfer core members of "security threat groups" was violative of the Free Exercise Clause of the First Amendment as well as the Equal Protection and Due Process Clauses. As in the present case, the prison's stated penological objective for justifying the policy was prison security. In addressing the third *Turner* factor, the Court of Appeals for the Third Circuit quoted the Fourth Circuit's opinion in *In re Long Term Admin. Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464, 470 (4th Cir.), *cert. denied*, 528 U.S. 874 (1999), which in turn relied upon *Turner*, stating that:

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[38] As well, although plaintiffs have stated that there is no opportunity to see their minor children and other relatives because the Department of Corrections prohibits minors from visiting Level 2 inmates, *see* Plaintiffs' Brief in Support of Their Motion for Summary Judgment, p. 16 (Docket No. 21), the LTSU Rules and Regulations, which have been provided by plaintiffs, states that the number of visitors during any given time is two which may include one child under the age of 18 and that "[t]he Shift Commander has the discretion to permit additional visitors such as small children and/or infants on a case-by-case basis." *See* Appendix to Plaintiffs' Brief in Support of Their Motion For Summary Judgment, p. 23 (Docket No. 22).

> Prison administration often involves tradeoffs. In the closed environment of a prison, greater liberties for some may mean increased danger and intimidation for others. Because increased freedom for the Five Percenters would come "only at the cost of significant less liberty and safety for everyone else, guard and other prisoners alike," we are particularly reluctant to interfere with the judgment of the [prison officials] in this case.

Fraise v. Terhune, 283 F.3d at 520. Noting that under *Turner* a highly deferential standard should be applied when there is a "ripple effect" on others, the *Fraise* Court found that the fourth prong had been satisfied. *Id.*

Here, having already found ample evidence to support a finding that access to newspapers, magazines and photographs presents a threat to the security of both guards and other prisoners in the LTSU, it appears that accommodating plaintiffs' asserted right would have the very "ripple effect" referred to in *Turner* and *Fraise*. Accordingly, the prison officials are entitled to a high degree of deference and, under *Fraise*, the third factor also appears to weigh in defendant's favor.

Nor does plaintiffs' renewed argument that because inmates in other segregated units have access to newspapers and magazines without negative impact compel a different result. Indeed, it is not the mere presence of the magazines and newspapers that create the security concerns but what these particular inmates have chosen to do with them. The fact that other segregated inmates have not created the same security concerns while in possession of newspapers and magazines is one reason why they are in those units and not in the LTSU. Indeed, it appears that the

same fate awaits any of the inmates confined in any of the other segregation units that cannot maintain an acceptable level of behavior. Conversely, plaintiffs are being deprived of newspapers and magazines because they have already proven themselves to be unwilling to behave in a responsible manner which precipitated their transfer to the LTSU in the first instance.

In addition, as argued by defendant, absent allowing plaintiffs access to the prohibited materials, which has proven unsuccessful, the only alternative appears to be individually escorting Level 2 prisoners to the mini library which is the only available site in the LTSU for reading newspapers. Such an accommodation, however, would not only intensify security concerns by increasing the amount of inmate movement but it would seemingly place a formidable burden on the LTSU staff. *See Allah v. Al-Hafeez*, 208 F.Supp.2d 520, 530 (E.D.Pa. 2002) (Finding that the third *Turner* factor weighed in defendants' favor where plaintiff's behavior created a security concern and that accommodating his attendance at religious services would require more monitoring thereby straining prison resources and affecting the prison staff and other inmates.)

Finally, the court must evaluate where there are alternatives to the policy that would impose only a de minimis cost to valid penological interests. *Fraise v. Terhune*, 283 F.3d at 513-514.

Plaintiffs suggest that an alternative would be to establish a reading period during which guards would deliver newspapers and magazines to each inmate in their respective cells and retrieve them at the end of the period. Plaintiffs argue that the number of publications that each inmate could have in his cell at one time could be limited as well as the number of days each week that the reading materials would be distributed.

We fail to see, however, how having a designated reading period would prevent the Level 2 inmates from using the reading material provided to them to start fires, fling feces or create weapon, as they have shown a willingness to do. Indeed, it appears that in order to give effect to plaintiffs' proposed alternative a guard would be required to monitor each cell during the reading period thus impacting not only the guards and other inmates but prison resources as well. Moreover, implementing plaintiffs' suggestion would not be without sacrifice to the prison's behavioral modification goals. It therefore appears that the cost of plaintiffs' proposed alternative is not de minimis and the fourth consideration set forth in *Turner* also appears to weigh in defendant's favor. *See Fraise v. Terhune*, 283 F.3d at 521, quoting *Turner*, 482 U.S. at 91 ("We reiterate that our inquiry is not whether the state could have adopted a less restrictive alternative but rather it could have adopted an alternative that imposed only 'de minimis cost to legitimate penological interests.'")

Because all of the factors set forth in *Turner* appear to weigh in defendant's favor, the LTSU's policy prohibiting access to newspapers, magazines and photographs appears to be reasonably related to legitimate penological interests and, thus, is properly upheld notwithstanding its intrusion on plaintiffs' Constitutional rights.

For these reasons, it is recommended that the motion for summary judgment submitted on behalf of defendant (Docket No. 16) be granted, and plaintiffs' motion for summary judgment (Docket No. 20) be denied.

Within ten (10) days of being served with a copy, any party may serve and file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of

service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

Respectfully submitted,

/s/ Robert C. Mitchell

ROBERT C. MITCHELL
United States Magistrate Judge

Dated November 15, 2002

	RHU	SMU	LTSU
Activities	In Cell	Phase 5, 4 and 3-In Cell Phase 2 in Small Groups	Same as RHU
Commissary	DC Status – Toilet Articles AC-Status-In accordance with AC Commissary List. **No Tobacco products permitted.**	Phases 5 and 4-Writing Materials Only Phase 3-$10 per week (no clothing) Phase 2-$20 per week (no clothing) **No Tobacco products permitted.**	Level 2 – None Level 1-$5 per week **No Tobacco products permitted.**
Compensation	As per DC-ADM 816, Inmate Compensation System	Same as RHU	Same as RHU
Counseling Services	In Cell Visits by Counselor	Phases 5, 4 and 3-In Cell Visits by Counselor Phase 2 / Small Group Unit	Same as RHU
Educational Services	Both Status-In cell as approved by PRC	All Phases – In cell as approved by Unit Team Phase 2 – Small Group in Unit	Level 2-In cell study (GED and Special Ed, if approved) Level 1 – None
Employment	DC Status-Unit Janitor (if no AC available) AC Status – Unit Janitor	Phases 5 and 4 – None Phase 3 – Unit Janitor (if no phase 2 available) Phase 2 – Unit Janitor	Level 2 – Unit Janitor (if no Level 1 available) Level 1 – Unit Janitor
Exercise	1 Hour – 5 Days a Week	Same as RHU	Same as RHU
Laundry	Twice per week	Same as RHU	Same as RHU
Legal-Religious Materials	Contents of 1 Records Center Box	Same as RHU	Same as RHU
Library Services	Recreational books from library. Mini law library on unit.	Same as RHU	Same as RHU
Mail-Incoming Publications	Legal/Personal Correspondence as per DC-ADM 803, Inmate Mail and Incoming Publications	Phase 5 – 1 Newspaper, 10 Photos Phase 4 – 1 Newspaper, 10 Photos, 1 Magazine Phase 3 – 1 Newspaper, 10 Photos, 10 Magazines Phase 2 – Same as Phase 3	Level 2 – Legal/Personal Correspondence Level 1 – Legal/Personal Correspondence, 1 Newspaper, 5 Magazines
Medical-Dental	In Unit Screening	Same as RHU	Same as RHU
Mental Health	In Unit Screening	Same as RHU	Same as RHU
Property	AC/DC Status – Toilet Articles, Shower Shoes, Eyeglasses, Dentures	All Phases – Shower Shoes, Dictionary, Eyeglasses, Dentures	Both Levels-Shower Shoes, Dictionary, Eyeglasses, Dentures
Radio-Television	DC Status – None AC Status – As approved by PRC	Phases 5 and 4 – None Phase 3 – Radio only Phase 2 – Radio and Television	Level 2 – None Level 1 – None
Religious Activities	In Cell Visits by Chaplain	Same as RHU	Same as RHU
Showers	Three (3) per week	Same as RHU	Same as RHU
Telephone Calls	DC Status As per DC-ADM 801, Inmate Discipline AC Status As per DC-ADM 802, Administrative Custody Procedures	Phase 5 – and 4 – Emergency Only Phase 3 – One per month Phase 2 – One every 2 weeks	Level 2 – Emergency Only Level 1 – 1 per month
Visits All Non-Contact	DC Status – 1/month immediate family. AC Status – 1/week	Phase 5 – 1/month immediate family Phases 4 & 3–1/week and 2 weekend/holiday a month Phase 2 – 1/week and 3 weekend/holiday a month	Level 2 – 1 per month immediate family Level 1 – 2 per month immediate family

(2)

No. 04-1739

FILED
SEP 30 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY BEARD,

Petitioner

v.

RONALD BANKS,

Respondent

OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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I. COUNTERSTATEMENT OF THE CASE

In this Section 1983 class action, inmates who are confined on Level 2 status in the Pennsylvania Department of Corrections' Long Term Segregation Unit challenge the constitutionality of a Department policy which denies them access to all newspapers and magazines that are not religious or legal in nature and prohibits them from having photographs of family members or friends in their cells. See *Banks v. Beard*, 399 F.3d 134, 136 (3 Cir. 2005) The prisoners contend that precluding them from receiving information from periodicals about current political, social, and other activities occurring outside the prison walls and not allowing them to have even a single photograph of a spouse or child in their cells offends the free speech component of the First Amendment.[1] See *Banks*, 399

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[1] The First Amendment's free speech provision encompasses the right to receive information and ideas through written publications. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972). This right has been held to survive incarceration. See *Crofton v. Roe*, 170 F.3d 957, 959 (9 Cir. 1999); *Sizemore v. Williford*, 829 F.2d 608, 610 (7 Cir. 1987). The right to possess photographs in a prison setting has also been found to implicate free speech. See *Davis v. Norris*, 249 F.3d 800, 801 (8 Cir. 2001); *Balance v. Virginia*, 130 F.Supp.2d 754, 758-759 (W.D.Va. 2000). The Department's petition does not take issue with the Circuit Court's conclusion that denying Level 2 inmates access to these materials impinges on constitutionally protected rights.

F.3d at 145. More particularly, they assert that the policy fails the *Turner v. Safley* reasonableness test either because it bears no rational connection to a legitimate penological interest or is an exaggerated response to such an interest. See *Banks*, 399 F.3d at 138.

In the motion for summary judgment submitted below, the Department of Corrections argued that the policy is reasonably related to the penological interests of rehabilitation (through behavior modification) and security (by reducing the possibility of cell fires, the concealment of contraband, the creation of paper weapons, and the hurling of feces). See *Banks*, 399 F.3d at 137-138. The District Court granted the Department's motion, holding that the policy is reasonably related to both interests. *Banks*, 399 F.3d at 135. On appeal, a panel of the Third Circuit held that the evidentiary record does not establish as a matter of law that the policy bears a reasonable relationship to the asserted interests. *Banks*, 399 F.3d at 148. The panel reversed the entry of summary judgment and remanded the case for further proceedings. *Banks*, 399 F.3d at 148. When the Department's petition for a rehearing before the full Circuit Court was denied, the Department filed the pending petition for a writ of certiorari in this Court. The petition frames the following question: "*Does a prison policy that denies newspapers, magazines, and photographs to the most difficult inmates in the prison system in an effort to promote security and*

good behavior violate the First Amendment under the standards of Turner and Overton?"

The summary judgment record reflects that the Department of Corrections established its Long Term Segregation Unit in April of 2000 on the grounds of the State Correctional Institution at Pittsburgh as a place to confine inmates the Department views as too disruptive, violent, or problematic to house elsewhere in the State prison system. [A91; A3; A12] The record shows that there are approximately forty inmates segregated in the Unit at any given time, virtually all of whom are confined on Level 2 status -- the classification inmates are given when admitted to the Unit and in which they remain unless and until they are elevated to Level 1 status for satisfactory behavior. [A92-93; A26; A21; A3; A67] The evidence confirms that the policy of denying Level 2 Long Term Segregation inmates access to all but religious and law-related periodicals and prohibiting them from having personal photographs in their possession is both absolute and long-lasting. Pennsylvania Department of Corrections' policy prohibits Level 2 inmates from receiving non-religious/non-legal newspapers or magazines directly from publishers, from the prison library, or from any other source for as long as they are on that status. *Banks*, 399 F.3d at 137. The policy prohibits Level 2 inmates from receiving even individual articles clipped from periodicals unless the articles have a

personal connection to them. *Banks*, 399 F.3d at 137. The policy also precludes Level 2 prisoners from receiving and possessing personal photographs for the entire time they remain on that level. *Banks*, 399 F.3d at 137.

Under LTSU policy, inmates are required to remain on Level 2 status for at least ninety days after their admission to the Unit. *Banks*, 399 F.3d at 141. Many prisoners have remained on Level 2 status for months and even years beyond the initial ninety day period because the length of time inmates can be kept on Level 2 is open-ended. There is no expiration date and promotion from Level 2 status is subject to the discretion of prison personnel. *Banks*, 399 F.3d at 137, 141 A number of LTSU prisoners have been on Level 2 status since the Unit was established. *Banks*, 399 F.3d at 141. [See A93]

Pursuant to the challenged policy, all prohibited newspapers, magazines, and photographs in an inmate's possession at the time of his transfer to the Long Term Segregation Unit are seized and placed in storage. [A101] All such newspapers, magazines, and photographs sent to Level 2 inmates are intercepted and placed in storage. [A100; A106; A23] All such materials found in the cells of Level 2 prisoners are treated as contraband and destroyed. [A100] The only form of published reading material Level 2 inmates are permitted access to (other

than newspapers and magazines of a religious or legal nature) are *"leisure books"* that can be ordered from the prison library. [A32] Rules governing the Long Term Segregation Unit prohibit Level 2 inmates from having radios or televisions; prohibit telephone calls unless they are of an emergency or legal nature; limit Level 2 inmates to one social visit a month with an immediate family member; and require the prisoners to remain inside their cells 23 hours a day, one man to a cell. [A3; A12; A7; A21-23] Inmates are rarely able to speak or socialize directly with each other and are relegated to an existence of rigid isolation and idleness. [A3; A12] In this closed environment, the impact of the challenged policy is stifling and far-reaching. It essentially blocks the flow of information to these men about current political, social, and other public events occurring outside the prison walls. See *Banks*, 399 F.3d at 145. It also deprives them of the emotional benefits inherent in looking at photographic images of spouses, children, parents, and close friends.

In contrast to the blanket prohibition against periodicals for Level 2 inmates, the policy permits Level 1 Long Term Segregation Unit prisoners to have a subscription newspaper in their cells -- which can be exchanged on one-for-one basis after being read. [A77; A98] In addition, Level 1 prisoners are allowed to have five subscription magazines inside their cells at any time. [A77; A98] As underscored by the Circuit Court panel,

these are not the only differences between the two levels in terms of privileges. "*[E]ven without the challenged restriction, Level 2 LTSU segregation is more restrictive than Level 1 in several respects.*" *Banks*, 399 F.3d at 148. For example, Level 1 prisoners are permitted two social visits per month with "*any approved visitor.*" *Banks*, 399 F.3d at 148. In contrast, Level 2 prisoners are limited to only one visit per month with "*immediate family only.*" [A 21] Level 1 inmates are routinely permitted to have one fifteen minute social telephone call each month. *Banks*, 399 F.3d at 148. In contrast, Level 2 prisoners are prohibited from having any social telephone calls. [See A 21] Level 1 inmates have weekly access to the prison commissary to make purchases of food and other items. *Banks*, 399 F.3d at 148. In contrast, Level 2 inmates have no access to the commissary. [Compare A 21-22] Level 1 inmates can receive pay for their work as Unit janitors. *Banks*, 399 F.3d at 148. In contrast, Level 2 inmates cannot receive compensation for janitorial work. *Banks*, 399 F.3d at 148. As a matter of policy, Level 1 inmates are permitted to participate in GED and Special Education studies. *Banks*, 399 F.3d at 148. Level 2 inmates cannot participate in those programs. *Banks*, 399 F.3d at 148. LTSU policy provides that "*[a]dditional privileges/cell property may be authorized [for Level 1 inmates] at the discretion of the Unit Management*

Team or the [Program Review Committee]."[2] [A22] There is no such provision for Level 2 inmates. [See A21]

The summary judgment record also confirms that the Department's policy of denying Level 2 inmates access to all non-religious/non-legal periodicals as well as photographs of loved ones differs dramatically from the policies that govern every other category of segregation in the State prison system. See *Banks*, 399 F.3d at 143. In fact, thousands of Pennsylvania prisoners are given access, as a matter of policy, to newspapers and magazines through subscriptions with publishing companies or purchases from the prison commissary and, with only one exception, are permitted to have photographs of relatives and friends in their cells. [A5, ¶15; A6, ¶19; A13, ¶15; A14, ¶19]

Department policy authorizes Special Management Unit inmates (segregated inmates who have been identified as being among the most difficult inmates in the system) to have varying amounts of subscription newspapers, magazines, and photographs in their cells, depending upon their classification levels. [A77; A59; A111] Department policy allows Death Row inmates to have as many subscription magazines in their cells that

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[2] As discussed later, the Circuit Court found these differences to be relevant to the rehabilitation objective asserted by the Pennsylvania Department of Corrections.

can be stored in a standard records-size box (with their other reading materials or documents) as well as one subscription newspaper, which can be replaced on a one-for-one exchange basis. [A85] Department policy allows the dangerous inmates who are segregated on administrative custody status in the Department's Restricted Housing Unit to have one subscription newspaper in their cells (which can be exchanged on a one-for-one basis), subscription magazines, and up to ten photographs. [A111; A77; A98; A49-51]

In the framework of its motion for summary judgment, the Department of Corrections submitted the deposition testimony of Joel Dickson, the Deputy Superintendent who supervises the LTSU. According to Dickson, the withholding of these so-called "privileges" in Level 2 Long Term Segregation is a way to modify negative behavior, prompt inmates to comply with prison rules, enable prisoners to become "more productive citizen[s]" if released from prison, or eventually be integrated into the general prison population if not released from prison. [A109-111; see also A21] In addition, the Department presented testimony from Dickson that prohibiting all periodicals and photographs in Level 2 Long Term Segregation reduces the possibility of fires in the Unit, makes it more difficult for inmates to hide contraband items in their cells, and eliminates a potential way for inmates to fashion weapons or implements with

which to fling human waste and other projectiles inside the Unit. [A110]

The Third Circuit panel considered these stated objectives, reviewed the evidentiary record, analyzed the record under the illumination of the four *Turner* factors, and concluded that "*the DOC's policy that prohibits inmates confined in the LTSU at Level 2 status access to photographs, and all newspapers and magazines which are neither legal nor religious in nature, cannot be supported as a matter of law by the record in this case.*" *Banks*, 399 F.3d at 148. The Department of Corrections argues in its petition for certiorari that the holding was fundamentally skewed by the panel's alleged deviations from principles established in *Turner v. Safley, 482 U.S. 78 (1987)* and in *Overton v. Bazzetta*, 539 U.S. 126 (2003); deviations which the Department contends reflect a conflict among the Circuits as to the proper "*application*" of those cases. The Department of Corrections' petition cites three principles that the Third Circuit panel purportedly failed to follow which two other circuits, according to the Department, have adhered to. The first is the panel's alleged failure to follow *Turner's* admonition that "*judgments regarding prison administration generally be made by prison officials, not judges.*" The second is the Third Circuit panel's alleged failure to adhere to *Overton's* prescription that it is the inmates' burden to establish the unconstitutionality of a challenged policy; not

the burden of prison officials to show that a policy is constitutional. The third is the panel's alleged failure to adhere to the principle that the *"absence of ready alternatives factor"* in *Turner* is not a least restrictive alternative test that requires prison officials to *"set up and shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint."*[3] [See Petition, pp. 7-10] These contentions, which are addressed below, ignore the actual summary judgment record and how the Third Circuit actually analyzed that record. The Department's argument attempts to portray a conflict among the circuits, where none, in fact, exists.

II. ARGUMENT AGAINST GRANTING CERTIORARI

A. The Judicial Restraint/Proper Deference Contentions

When attempting to persuade this Court that there is a conflict among the circuits with respect to the application of the *Turner* analysis, the Department of Corrections asserts that *"[d]espite the Court's clear direction in Turner, and again in Overton, some courts of Appeals, like the Third Circuit, have been reluctant to give proper deference to prison officials in matters of prison*

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[3] In addition, the Department insists that the Third Circuit's reversal of summary judgment was diametrically *"at odds"* with the *Turner* and *Overton* precedents and, therefore, should be summarily reversed.

administration" in cases such as this. [Petition, p. 9] The Department summarizes cases that are said to lie on opposite sides of the "*proper deference*" ledger and insists that these decision show there is a need for this Court to review the present case in order to provide lower courts necessary guidance on the application of the *Turner/Overton* dictates. The Department is mistaken.

The Department of Corrections exaggerates the amount of deference that must be accorded to prison administrators under *Safley* and *Overton*. In *Thornburg v. Abbott*, 490 U.S. 401 (1989), this Court reiterated what was implicit in *Turner:* that the "*reasonableness standard is not toothless.*" *Thornburg*, 490 U.S. at 414. The reasonableness standard is not toothless because federal courts are expected not only to consider the need to exercise judicial restraint and to give deference to the policy decisions of prison administrators, but also to consider and protect the constitutional rights of inmates who are affected by such policies. See *Turner*, 482 U.S. at 84-85. When establishing the standard in *Turner*, this Court recognized that inmates are not stripped of their constitutional rights as they pass through prison gates; that among the *"principles that necessarily frame our analysis of prisoners' constitutional claims...is that federal courts must take cognizance of the valid constitutional claims of prison inmates;"* that if a "*prison regulation or practice offends a fundamental constitutional guarantee,*

federal courts will discharge their duty to protect constitutional rights;" and that the "*standard of review for prisoner's constitutional claims...is responsive both to the policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights." Turner, 482 U.S.* at 84-85. In the final analysis, a federal court, when addressing a challenge to a prison policy that implicates a prisoner's constitutional rights, is "*called upon to balance [those] rights against [legitimate] governmental interests." Turner, 482 U.S.* at 88.

Despite the need for judicial restraint and the considerable deference that is owed to prison officials, this Court in *Turner* did <u>not</u> decline to strike down a Missouri Division of Corrections inmate marriage policy which permitted inmates to marry only with the permission of the superintendent of the prison and, then, only if there were compelling reasons for approving a marriage. *Turner, 482 U.S.* at 82. The challenged policy prohibited marriages between inmates and civilians as well as marriages between inmates. *Turner, 482 U.S.* at 97. The Missouri Division of Corrections identified security and rehabilitation concerns (the same penological concerns involved in this case) in support of the marriage prohibition. *Turner, 482 U.S.* at 97. The security concern was that "*love triangles*" might lead to violent incidents among inmates. *Turner, 482 U.S.* at 97. The rehabilitation concern was that female inmates were

frequently subject to abuse at home, were overly dependent on males, and that the criminal activities of women were often connected either to their histories of abuse or overdependence. *Turner, 482 U.S.* at 97. The record contained testimony from a prison superintendent that such inmates needed to concentrate on developing self-reliance skills and that he had received several "ill-advised" marriage requests from women prisoners. *Turner, 482 U.S.* at 97.

After reviewing the evidence as well as exercising "[c]ommon sense," this Court determined that the Missouri regulation, as written, was not reasonably related to the penological interests put forth by prison administrators. *Turner, 482 U.S.* at 97. The regulation was determined to be a rule that "*sweeps much more broadly than can be explained by petitioners' penological objectives*" and was characterized as an "*exaggerated response*" to the asserted objectives. *Turner, 482 U.S.* at 97-98. Those conclusions were made despite the insistence of prison officials that security and rehabilitation objectives justified the policy.

When addressing the security concerns of prison officials in *Turner*, this Court wrote:

> *No doubt legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry, and may justify requiring approval of the superintendent.* ***The Missouri regulation,***

> ***however, represents an exaggerated response to such security objectives. There are obvious, easy alternatives to the Missouri regulation that accommodate the right to marry while imposing a de minimis burden on the pursuit of security objectives. See, e.g., 28 CFR § 551.10 (1986) (marriage by inmates in federal prison generally permitted, but not if warden finds that it presents a threat to security or order of institution, or to public safety).*** *We are aware of no place in the record where prison officials testified that such ready alternatives would not fully satisfy their security concerns. Moreover, with respect to the security concern emphasized in petitioners' brief -- the creation of "love triangles" -- petitioners have pointed to nothing in the record suggesting that the marriage regulation was viewed as preventing such entanglements.* ***Common sense*** *likewise suggests that there is no logical connection between the marriage restriction and the formation of love triangles: surely in prisons housing both male and female prisoners, inmate rivalries are as likely to develop without a formal marriage ceremony as with one...*

Turner, 482 *U.S.* at 97-98. (emphasis added)

In connection with the asserted rehabilitation objective, this Court wrote:

> *Nor, on this record, is the marriage restriction reasonably related to the articulated rehabilitation goal. First, in requiring refusal of permission absent a finding of a compelling reason to allow the*

> *marriage,* ***the rule sweeps much more broadly than can be explained by petitioners' penological objectives.*** *Missouri prison officials testified that generally they had experienced no problem with the marriage of male inmates, see., e.g., 2 Tr. 21-22, and the District Court found that such marriages had routinely been allowed as a matter of practice at Missouri correctional institutions prior to adoption of the rule. 586 F.Supp., at 592. The proffered justification thus does not explain the adoption of a rule banning marriages by these inmates. Nor does it account for the prohibition on inmate marriages to civilians. Missouri prison officials testified that generally they had no objection to inmate-civilian marriages, see e.g. 4 Tr. 240-241, and superintendent Turner testified that he usually did not object to the marriage of either male or female prisoners to civilians, 2 id., at 141-142. The rehabilitation concern appears from the record to have been centered almost exclusively on female inmates marrying other inmates or ex-felons; it does not account for the ban on inmate-civilian marriages.*

Turner, 482 U.S. at 98-99. (emphasis added)

As reflected above, the standard announced in *Turner* does not contemplate that federal courts simply rubberstamp the administrative decisions of prison officials. Nor does it contemplate that prison officials will set constitutional standards by fiat. Deference, within the meaning of *Turner,* does not mean judicial abdication.

Instead, the reasonableness standard permits judges to review the evidentiary record to ascertain whether there is a logical connection between a challenged policy and the penological reason said to underlie the policy and (if there is) to determine whether the policy amounts to an exaggerated response to the asserted reason. A decision, predicated on evidence that a policy is far broader than warranted -- as was the case here -- does not reflect a failure on the part of a court (in the context of summary judgment) to accord proper deference to prison administrators. Instead, it is a proper exercise of a federal court's function in a *Turner* context. The Pennsylvania Department of Corrections' contention that the Third Circuit (as evidenced by the decision in this case) has "*been reluctant to give proper deference to prison officials in matters of prison administration,*" overlooks the analysis undertaken in *Turner*, distorts how the Circuit Court panel analyzed the material facts and controlling legal principles, and advocates a degree of deference which would, if adopted by this Court, render the *Turner* standard a "*toothless*" exercise.

In the present case, after summarizing the evidentiary record, the Circuit Court concluded that prohibiting LTSU Level 2 inmates from having a single newspaper, magazine, or photograph has no significant relationship to the Department of Corrections' stated security objectives because "*[t]here are many other non-*

prohibited means for inmates to fuel fires, hurl waste, conceal contraband and create weapons." *Banks*, 399 F.3d at 143. The Court noted that under existing Department rules, each inmate in the LTSU "*is given a jumpsuit, a blanket, two bed sheets, a pillow case, a roll of toilet paper, a copy of a prison handbook, ten sheets of writing paper, several envelopes, carbon paper, three pairs of socks, three under shorts and three undershirts, and may at any point also have religious newspapers, legal periodicals, a prison library book, Bibles, and a lunch tray with a plate and a cup.* *Banks*, 399 F.3d at 143. The Court recognized that *"[m]any of these items are flammable [and] could be used for the above purposes as effectively as a newspaper, magazine or photograph..."* *Banks*, 399 F.3d at 143. While acknowledging that the Department's regulation does not have to be "*narrowly tailored to the harm it addresses to pass constitutional muster*", and, therefore, does not have to eliminate cell fires or fully address the other security matters identified by the Department, the Court stated that "*if the prohibition of newspapers, magazines and photographs has only minimal effect on security in the LTSU because of the other materials that are permitted in the cells, the relationship between the policy and the penological interest may be too attenuated to be reasonable.*" *Banks*, 399 F.3d at 144. *"It is important to note here,"* the Court stressed, *"that the inmates are not*

requesting unlimited access to innumerable periodicals but for the ability to have one newspaper or magazine and some small number of photographs in their cells at one time." *Banks*, 399 F.3d at 144. In light of the evidentiary record, the Court's conclusion that the link between security and the challenged policy is weak was self-evident and a matter of common sense. It was comparable to *Turner's* common sense conclusion that love triangles in a prison can exist with or without a formal marriage. See *Turner, 482 U.S.* at 98. The conclusion did not represent a failure to properly defer to prison officials.

When determining that the connection between the policy and the Department's rehabilitation objective is attenuated, the Circuit Court noted that "*the DOC has offered no evidence that the rule achieves or could achieve its rehabilitative purpose.*" In fact, the panel's majority opinion indicated that the withholding of periodicals and photographs had not proven effective with LTSU inmates as a rehabilitative tool. *Banks*, 399 F.3d at 141-142. The panel specifically noted that during oral argument (which occurred three years after the policy had been in effect) the Department expressed a "*hope*" that the policy would work. *Banks*, 399 F.3d at 142. That expression of "*hope*" supports an inference that in the years since implementation of the policy, the policy had not worked as a rehabilitation tool and that the

withholding of the First Amendment materials at issue has no more than a tenuous relationship to that objective.

The Circuit Court's evaluation of the second *Turner* factor (whether there is an alternative means available for exercising the burdened right) did not reflect a failure on its part to accord proper deference to prison officials. The panel correctly noted that *"if other avenues are open for the inmate to exercise the right in question, the court should exhibit deference to the judgment of corrections officials, while if no other avenues are available, the inmate's right is given greater weight in the Turner balancing process."* *Banks*, 399 F.3d at 144. The panel properly found that the policy's prohibition is absolute for as long as an inmate remains on Level 2 status and that a Level 2 prisoner *"has no alternative means to exercise his First Amendment right of access to a reasonable amount of newspapers, magazines, and photographs."* *Banks*, 399 F.3d at 145. In conjunction with that determination, it cited the inmates' argument that although they had access to leisure books, they had no meaningful access to news accounts or published information about current political, social, or other public events and activities occurring outside the prison walls, or a way to look at images of loved ones and friends apart from the possibility of infrequent visits. *Banks*, 399 F.3d at 145. Under these circumstances, the level of deference owed to prison administrators was diminished

and the First Amendment rights impacted by the blanket prohibition had relatively greater weight.

When evaluating the third and fourth factors of the *Turner* analysis under the evidentiary record, the Circuit Court was not indifferent to the requirement that it give proper deference to prison officials. The Court noted in conjunction with those factors that it had to determine whether the constitutional right in question could be accommodated without "significant negative consequences" in terms of institutional security and efficiency and whether the prison could "*easily serve its interests*" in other ways "*without infringing upon the rights of prisoners.*" *Banks*, 399 F.3d at 146 (citation omitted) The panel went on to say that the "*existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns.*" *Banks*, 399 F.3d at 146, quoting *Thornburgh v. Abbott*, 490 U.S. at 418. On the other hand, the Court said, "*[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow-inmates or prison staff, courts should be particularly deferential to the informed discretion of prison officials.*" *Banks*, 399 F.3d at 146, n. 10, quoting *Turner*, 482 U.S. at 90. These were accurate expositions of relevant legal principles.

The Circuit Court panel held, despite the Department's assertions to the contrary, that it did not agree "*on the record before us, that accommodation of*

these prisoners' rights by giving them reasonable access to a limited number of periodicals and photographs would have such a 'ripple effect.'" *Banks*, 399 F.3d at 146, n. 10. The panel reasoned as follows in connection with any impact an accommodation would have on institutional security:

> *At no point does Banks propose that Level 2 inmates be allowed unmitigated and unregulated access to all periodicals. Rather, Banks proposes, and the District Court discussed, two alternative policies which would accommodate the prisoners' rights. First, the DOC could establish a specific reading period, or several different reading periods, in which guards deliver a single newspaper or magazine to an inmate's cell, if requested, and retrieve it at the close of the period.* ***The DOC could easily control the number of periodicals in his cell at one time, the frequency of the distributions, the amount of time any inmate would be in possession of the materials, as well as the number of inmates who would have periodicals in their cells at any one time. The DOC could also limit the total number of photographs a Level 2 inmate could have in his cell at one time to what they consider a reasonable number. In conjunction with this policy, access to periodicals could be entirely withheld from those individual prisoners who, in the judgment of prison officials, would pose a particular risk given their records, or those inmates who have abused their use of periodicals or photographs.*** *The DOC asserts that such*

> *a limited restriction would not prevent Level 2 inmates from using the materials to start fires, fling feces and create weapons and therefore, during the reading period, extra monitoring of cells would be required, thus affecting the prison's resources and possibly the safety of other inmates.*
>
> *We fail to see, however, as discussed above under factor one, how an inmate's hour-long possession of Graterfriends would require further monitoring when at any time that inmate may be in possession of 10 sheets of writi g paper, and as many copies of the Watchtower, the Jewish Daily Forward, and the Christian Science Monitor Magazine as can fit in a records center box...*

Banks, 399 F.3d. at 146-147. (emphasis added)[4]

The Circuit Court went on to discuss a second alternative to completely banning periodicals and photographs for prisoners on Level 2 status. Just as the panel had concluded when addressing the first alternative, it found that the second proffered

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[4] The accommodation cited by the Circuit Court of prohibiting specific inmates who either abused or who (in the Department's judgment) would abuse the materials was consistent with the approach discussed in *Turner* when this Court struck down the blanket banning of inmate marriages. The accommodation was the prohibition of particular inmates from marrying *"if the warden finds that it represents a threat to security or safety."* *Turner*, 482 U.S. at 98. A more limited, particularized approach was obviously not viewed by this Court as being inconsistent with the proper deference that must be given to prison administrators.

accommodation would have little impact on security. The Court wrote:

> *Alternatively, individual prisoners could be escorted to the secure mini-law library to read a periodical of their choosing. Again, the District Court found that such an accommodation would intensify security concerns by increasing the amount of inmate movement and thereby placing a formidable burden on LTSU staff. Inmates are already permitted to leave their cells under guard escort to use the library to view legal materials, so individual inmate escort has not been deemed prohibitively burdensome or dangerous by prison administrators. Although it is possible that the demand for mini-law library sessions may increase if the policy were changed, the DOC has not shown how this would significantly increase the burden on prison staff. Superintendent Dickson explained in his deposition that under current LTSU policy, one inmate is allowed out of his cell at a time to visit the law library for one two-hour session. A roster of requests, like a waiting-list is maintained and fulfilled on a first-come first-serve basis. The amount or frequency of inmate movement is already regulated. If the inmates' rights to read other periodicals were accommodated, that would not change.* ***We fail to see how the mere addition of non-legal and non-religious periodicals to the materials already available to the inmates in the library would create the "ripple effect" cited by the DOC.*** *In short, the DOC has not shown that a change in the publication ban would mean "significantly less liberty and safety for everyone else, guards and*

> *other prisoners alike." Abbott*, 490 U.S. at 418, 109 S.Ct. 1874 (quoting *Turner*, 482, U.S. at 92, 107 S.Ct. 2254).

Banks, 399 F.3d. at 147. (emphasis added)

Finally, the Circuit Court panel addressed the impact on rehabilitation of permitting Level 2 inmates to have access to a limited number of the prohibited materials. When concluding that the impact would not be significant, the Court reasoned:

> *[T]he District Court asserted that the alternatives proposed come at more than a de minimus cost to the DOC's behavior modification goals because the accessibility of periodicals would render the threat of Level 2 segregation toothless as a deterrent. However, the District Court overlooked* ***the extent to which, even without the challenged restriction, Level 2 LTSU segregation is more restrictive than Level 1 in significant respects****. For example, Level 1 inmates are permitted two family visits and one fifteen minute telephone call per month. They are also permitted to spend $5.00 per week at the commissary on items defined by the Unit Team. Additionally, while inmates at both levels receive in-cell counseling and visits from chaplains, and can be employed as Unit Janitor, only Level 1 inmates receive compensation as per DC-9816 Inmate Compensation System, and only Level 1 inmates are permitted GED and Special Education in cell study. [App. 32]*

Banks, 399 F.3d at 147-48.[5] (emphasis added)

None of the above analysis deviates from *Turner* principles. Instead, the Court's approach reflects what a federal court is authorized and expected to do when engaging in the weighing process envisioned by the Supreme Court. When ascertaining whether a challenged policy represents an exaggerated response, deference does not mean that a court should accept, at face value, the assertion of prison officials that a less restrictive policy will result in greater harm to security, rehabilitation, or other penological interests. Instead, a court must ask and determine whether such fears are "*reasonably founded.*" See *Thornburgh v. Abbott, 490 U.S. at 419.*

B. The Department's Burden of Proof Contention

Overton v. Bazzetta holds that "*[t]he burden...is not on the State to prove the validity of prison regulations*

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[5] In addition, as noted before, while "*[a]dditional privileges/cell property may be authorized [for Level 1 inmates] at the discretion of the Unit Management Team or the [Program Review Committee]*", Level 2 inmates are not eligible for additional privileges or cell property. [See A21-22] With respect to visits, Level 2 inmates may only visit with immediate family members while Level 1 prisoners can visit with any approved visitor, whether immediate family or not. [A75]

but on the prisoner to disprove it." Overton, 539 U.S. at 133. The Department argues that the Circuit Court improperly required it to prove the constitutionality of its policy. That argument appears to be based on the Circuit Court's references to the lack of certain evidence in the summary judgment record indicating a logical connection between the challenged policy and the stated security/rehabilitation objectives.

When examining the record in the context of first *Turner* factor, the Circuit Court noted there is no evidence in the record of periodicals or photographs being misused in any of the ways described by the DOC; of the frequency of fires in the LTSU or elsewhere in the prison; of any LTSU inmates being transferred to the Unit because they had created security risks with periodicals or photographs; or of the policy working as a rehabilitation tool. The Court did not, however, rest its denial of summary judgment on the lack of such evidence or, more broadly, on the lack of a logical connection between the policy and the stated penological objectives. Instead, the panel cited to additional facts (as discussed in the preceding section) that indicated an attenuated relationship between the policy and the stated objectives as well as facts pertinent to the second, third, and fourth *Turner* factors. In the end, the panel's decision rested on evidence -- most of it adduced by the inmates -- that the policy was an exaggerated response to the penological

interests asserted by the Department and, therefore, was not reasonably related to legitimate penological interests under the four-part *Turner* test.

In conjunction with the issue of whether a prison policy is an exaggerated response to legitimate penological interests, "*when prison officials are able to demonstrate that they have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm, they succeed in demonstrating that the alternative they in fact selected was not an 'exaggerated response' under Turner.*" See *Thornburgh*, 490 U.S. 419. As reflected in the Circuit Court's analysis, that did not occur here with respect to the two alternatives proposed by the inmates. The record did not contain evidence of such reasonably founded fears on the part of prison officials.

C. The Department's Conflict Among the Circuits Contention

The Department of Corrections argues that the Third Circuit's decision in this case "*is part of a split among the circuit courts applying Turner to analyze restrictions like these.*" [Petition, p. 9] The Department cites two cases that allegedly "*have taken an approach more in line with Turner and Overton.*" [Petition, p. 10] One is *Maydak v. United States*, 98 Fed.Appx. 1, 2004 WL 852218 (D.C.Cir. 2004). The other is *Wirsching v.*

Colorado, 360 F.3d 1191 (10 Cir. 2004). The Department suggests that the courts in *Maydak* and *Wirsching* (unlike what the Department alleges occurred in the present case) accorded substantial deference to the judgment of prison administrators and placed the burden of proof on the inmates, not on administrators, in connection with the constitutionality of the policies at issue.

Maydak is an unpublished opinion of a District of Columbia Circuit Court panel. Under Rule 36(c) of the D.C. Circuit, "*[w]hile unpublished orders and judgment may be cited to the court...a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.*" [A134-137] Under these circumstances, the *Maydak* case serves as a poor basis for establishing the existence of a split among circuits.

In the *Wirsching* case, the Tenth Circuit's approach with respect to the proper deference and burden of proof principles did not differ in any significant way to the Third Circuit's treatment of those principles. Nor did the overall application of the *Turner/Overton* standard in *Wirsching* differ in any material way from the Third Circuit's application of the standard. The differences in the outcome of the two cases stem, instead, from the material differences in their facts.

At the threshold of its analysis, the *Wirsching* panel stated: *"Turner... requires courts, on a case-by-case basis, to look closely at the facts of a particular case and the specific regulations and interests of the prison system in determining whether prisoners' constitutional rights may be curtailed."* *Wirsching*, 4360 F.3d at 1199. (citation omitted) In the process of determining the constitutionality of a Colorado prison policy that prohibited visitations between sex offenders and their children, the Tenth Circuit panel concluded, after looking at the factual record, that prisoners had an alternative means of remaining in contact with children, namely, by letter and telephone. *Wirsching*, 360 F.3d at 1199. In the present case, the Third Circuit panel concluded on the basis of the record that there is no alternative way for Level 2 prisoners to have access to secular/non-legal periodicals or personal photographs. *Banks*, 399 F.3d at 145. In *Wirsching*, the Colorado Department of Corrections offered evidence that contact between sex offenders and their own children may adversely affect both the child and the offender. However, as noted by the *Wirsching* panel, the inmate "*offered no evidence to support his challenges to the CDOC's objectives.*" *Wirsching*, 360 F.3d 1191. In the present case, supporting evidence was offered by the inmates. See *Banks*, 399 F.3d 141-145. In *Wirsching*, the inmate made <u>arguments</u> but presented no <u>testimony</u> to rebut the

Colorado Department of Corrections' testimony related to the burden an accommodation would have on the operation of the prison and penological objectives.[6] See *Wirsching*, 360 F.3d at 1201. In this case, there is a significant body of evidence related to the minimal impact that accommodations would have in the operation of the LTSU and the stated objectives. See *Banks*, 399 F.3d at 146-148.

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[6] The Tenth Circuit panel noted if the prisoner had "*offered evidence as to the feasibility and minimum institutional effect of a less restrictive visitation policy, this would be a closer case.*" *Id.* at 1201.

III. CONCLUSION

It is respectfully submitted, for the reasons expressed above, that the Pennsylvania Department of Corrections' petition for a writ of certiorari should be denied. In addition, the Department's request for summary reversal of the Circuit Court's decision should be denied for the reasons outlined in sections 1 and 2 of this reply.

Respectfully submitted,

Jere Krakoff
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Pittsburgh, PA 15219
412.232.0276

Counsel for Respondent

DATED: September 30, 2005

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD BANKS, for himself and on behalf of all similarly situated prisoners who are confined or will be confined in Long Term Segregation Units of State prisons located in the Western Judicial District of Pennsylvania, Plaintiffs, v. JEFFREY BEARD, in his official capacity as Secretary of the Pennsylvania Department of Corrections, Defendant.	C.A. 01-1956

COPY
CLERK
US DISTRICT COURT
FILED

COMPLAINT

I. Jurisdiction

1. The court's authority to hear this putative class action derives from 28 U.S.C. Section 1343, a federal statute that confers district court jurisdiction over cases alleging constitutional violations. This pleading alleges that a specified category of segregated Pennsylvania prisoners is being systematically denied access to newspapers, magazines, and photographs of family members and friends pursuant to statewide Department of Corrections policies which prohibit those inmates from having such items in their cells. Grounding their claims on the free speech component of the

First Amendment, the putative class seeks declaratory and injunctive relief to end the ongoing abridgment of their civil rights. These allegations give the court a sound jurisdictional basis to hear this controversy.

II. Parties

2. Ronald Banks, the representative plaintiff in this Section 1983 action, is a sentenced inmate of the Pennsylvania Department of Corrections. He is confined in a maximum security administrative custody housing area of the State Correctional Institution at Pittsburgh known as the Long Term Segregation Unit. As a "Phase 2" inmate of the Unit, Mr. Banks (like all other Phase 2 Long Term Segregation Unit inmates in the prison system) is prohibited by Department policy from receiving newspapers and magazines unless they are of a religious or legal nature. Moreover, like all other LTSU Phase 2 inmates, he is prohibited by state prison policy from having photographs of family members and friends in his cell.

3. Jeffrey Beard, the defendant in this case, is the Secretary of the Pennsylvania Department of Corrections — the administrator of a penal system that operates the State Correctional Institution at Pittsburgh and all other state prisons that are located in the Western District of Pennsylvania. In that capacity, Mr. Beard perpetuates, implements, and enforces the policies that are challenged in this case.

4. Secretary Beard has acted under color of state law when systematically depriving Ronald Banks and other similarly situated inmates of their constitutional

right of free speech through enforcement of the challenged policies. He is sued in his official capacity.

III. Facts

5. Approximately two years ago, the Pennsylvania Department of Corrections established Long Term Segregation Units in certain of its prisons to house inmates who are said to be too disruptive, violent, or problematic to confine in other housing areas.

6. Two prisons in the Western District of Pennsylvania (SCI Pittsburgh and SCI Greene) have Long Term Segregation Units which (in combination) house more than a hundred prisoners on any given day, any one of whom can be placed on or be transferred out of Phase 2 status at the decision of prison officials. On information and belief, at least fifty LTSU inmates at any point in time are on Phase 2 status, although their identifies change on an ongoing basis.

7. As a matter of DOC policy, inmates are sequestered in Long Term Segregation Units (and on Phase 2 LTSU status) for indeterminate lengths of time. As such, they can be confined for many months and even years under the most restrictive and rigorous conditions existing in the state prison system.

9. Among other things, Long Term Segregation Unit prisoners are routinely locked inside their cells at least 23 hours a day; are routinely isolated, one inmate to a cell, throughout the day; are required to eat all meals in their cells; are rarely able to speak to or socialize directly with other prisons; are prevented by plexiglass barriers

from touching or embracing relatives and friends during their limited visitation opportunities; have sparse opportunities to make telephone calls to relatives and friends; are limited to a form of outdoor "recreation" that consists of occupying a small "exercise" cage an hour a day; and are consigned to an existence of rigid isolation and enforced idleness for periods of many months and even years.

10. In this already severely restrictive environment, Department of Corrections policy categorically prohibits Phase 2 Long Term Segregation Unit inmates from receiving newspapers or magazines directly from publishers, from prison libraries, or from any other source unless the publication is either religious or legal in nature.

11. Ronald Banks has been confined on Phase 2 status in SCI Pittsburgh's Long Term Segregation Unit since March 15, 2001. Over the course of this confinement (pursuant to DOC policy), SCI Pittsburgh officials repeatedly seized and kept from him copies of the Christian Science Monitor which were sent to him directly from the Christian Science Publishing Company through a subscription he had with the company.

12. The text of the Christian Science Monitor does not pose any meaningful risk to the security of the Long Term Segregation Unit, to the prison as a whole, or to the Department of Corrections. The content of the newspaper routinely addresses international news, health issues, governmental affairs, and other topics of current events that pose no threat to the security of the institution. It does not provide information regarding the means of escaping from prisons; does not facilitate or

advocate the manufacture or use of weapons, alcohol or drugs; does not contain sexual or pornographic images; does not contain racist or other such inflammatory language; does not advocate violence; and does not otherwise jeopardize the operation of the State Correctional Institution at Pittsburgh or the State prison system.

13. The paper on which the newspaper is printed does not pose any meaningful risk to the security of the Long Term Segregation Unit where Ronald Banks is confined, to any other area of the State Correctional Institution at Pittsburgh, or to the Department of Corrections as a whole.

14. The fact that the seized newspapers were sent to Ronald Banks directly from the publisher and were routinely subject to searches by prison personnel essentially eliminated the possibility that the materials were a means to smuggle contraband materials into him.

15. As a matter of routine practice and policy, thousands of inmates in the state prison system (including inmates in other forms of segregation) are allowed to receive newspapers, magazines, and other publications directly from publishers on an ongoing basis.

16. Denying Ronald Banks access to the Christian Science Monitor, to other comparable newspapers, or to magazines whose content does not otherwise offend Department of Corrections censorship policies, bears no reasonable relationship to legitimate penological purposes. The policy either serves no legitimate penological purpose or is an exaggerated response to a legitimate purpose.

17 Denying other Phase 2 Long Term Segregation Unit prisons access to newspapers, magazines, and other reading materials whose content does not otherwise offend Department of Corrections' censorship policy bears no reasonable relationship to legitimate penological interests. The policy either serves no legitimate purpose or is an exaggerated response to a legitimate purpose.

18 Ronald Banks is precluded as a result of his status as a Phase 2 Long Term Segregation Unit inmate from receiving and having photographs of his wife and other family members in his cell for the duration of his confinement on that status. This is also true, under Department of Corrections policy, for all other Phase 2 inmates.

19. As a matter of routine practice and policy, thousands of inmates in the Pennsylvania prison system (including inmates in other forms of segregation) are permitted to receive and possess photographs of family members and friends.

20. Categorically prohibiting Ronald Banks and all other Phase 2 Long Term Segregation Unit prisoners from receiving and keeping photographs of family members and friends in their cells bears no reasonable relationship to legitimate penological interests. The policy either serves no legitimate purpose or is an exaggerated response to a legitimate penological interest.

IV. Class Action Allegations

21. This lawsuit, for the following reasons, satisfies the prerequisites of the Federal Rules of Civil Procedure for the certification of a Rule 23(b) to class:

1) The class is so numerous that the joinder of all members of the class is impractical. There are more than a hundred inmates in the Long Term Segregation Units in the Western District of Pennsylvania. On information and belief, at least half of them at any given time are on Phase 2 status and, therefore, are subjected to the challenged policies. Moreover, the makeup or composition of the Phase 2 category of prisoners is fluid inasmuch as inmates are placed on Phase 2 status on a regular and ongoing basis during the course of the year. As such, joinder of all members of the class is impractical during the anticipated course of this litigation.

2) There are questions of fact that are common to the class. Among the questions are whether the policies challenged in the complaint actually exist, and if so, the reasons for them; the strength of the connection between the policies and the asserted reasons; and, ultimately, whether the policies offend the free speech rights of the class members.

3) The claims of the representative plaintiff is typical of the claims of the class. It is alleged that the challenged policies universally apply to all Phase 2 Long Term Segregated prisoners and preclude all Phase 2 inmates from receiving published newspapers, magazines, other comparable reading materials, and photographs.

7

As such, the unconstitutional policies cast a shadow over every member of the putative class

4) The representative plaintiff will fairly and adequately protect the interests of the class. The attorney who represents the named plaintiff is an experienced civil rights litigator. Moreover, there are no conflicts of interest involved in this case.

5) The defendant has acted or refused to act on grounds that are generally applicable to the class, thereby making final injunctive relief appropriate with respect to the class a whole. This is because the challenged policies have application to all members of the class.

V. Claim

22. The policy categorically denies Ronald Banks and other Phase 2 access to the kinds of publications involved in this case, offends the free speech component of the First Amendment to the United States Constitution.

23. The policy categorically denies Ronald Banks and other Phase 2 inmates the opportunity to receive and retain photographs of family members and friends violates the free speech component of the First Amendment to the United States Constitution.

VI. Equitable Relief

24 Ronald Banks and the inmates he represents have no adequate remedy at law to address the ongoing violations of their civil rights. As a result, the rights at stake will continue to be abridged unless and until the defendant is enjoined from doing so

25 The defendant's policy of denying Ronald Banks and similarly situated inmates access to photographs of family members and friends offends the free speech component of the First Amendment to the United States Constitution.

VII. Remedies

26. Ronald Banks and the putative class he seeks to represent respectfully request the following relief to redress the harm inflicted by the constitutional torts described above:

a. Certification of this case as a Rule 23(b)(2) class action on behalf of all current and future Phase 2 Long Term Segregation inmates who are or will be confined in Pennsylvania Department of Corrections prisons within the venue of the Western District of Pennsylvania;

b. The entry of a declaratory judgment holding that their right to free speech has been violated by the policies challenged in this case;

c. The issuance of preliminary and permanent injunctions prohibiting the Secretary from continuing to deny them access to the publications that are at issue here and to photographs of family members and friends;

d. An award of reasonable attorneys' fees, costs, and expenses generated by the prosecution of this case; and

e The granting of any other form of relief that is warranted by the circumstances of this case

Dated: October 18, 2001

Jere Krakoff, Esquire
PA I.D. No. 13701
1705 Allegheny Building
Pittsburgh, PA 15219
(412) 232-0276

On behalf of the Pennsylvania
Institutional Law Project

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD BANKS, of himself and on behalf of all similarly situated prisoners who are confined or will be confined in Long Term Segregation Units of State Prisons located in the Western Judicial District of Pennsylvania,	)	
Plaintiff,	)	
v.	)	Civil Action No. 01-1956
JEFFREY BEARD, in his official capacity as Secretary of the Pennsylvania Department of Corrections,	)	
Defendant.	)	

DEFENDANT'S ANSWER TO COMPLAINT

AND NOW, comes the defendant, by his attorneys, D. Michael Fisher, Attorney General, Kemal Alexander Mericli, Senior Deputy Attorney General, Susan J. Forney, Chief Deputy Attorney General, Chief, Litigation Section, and files the following answer to plaintiff's complaint:

FIRST DEFENSE

Defendant responds to plaintiff's factual allegations as follows:

1. Paragraph 1 is a series of conclusions of law to which no response is required.

2. Admitted.

3. Admitted.

4. Paragraph 4 is a conclusion of law to which no response is required.

5. Admitted.

6. Admitted, correcting "identifies" to identities."

7. Admitted.

8. There is no paragraph 8.

9. Admitted.

10. Admitted.

11. Admitted in part and denied in part. The first sentence of paragraph 11 is admitted. After reasonable investigation defendant is aware that a copy of the Christian Science Monitor was confiscated as stated on one occasion but can neither admit or deny as yet if this occurred repeatedly -- although it should have occurred in each instance. To this extent the allegations are denied and strict proof demanded.

12. After reasonable investigation and reflection, defendant can neither admit or deny the allegations of paragraph 12 without an extensive review of the origins, rationale and operation

of the policy in question from the standpoint of prison security and general prison administration and the safe and effective operation of the LTSU program. Thus, they are denied and strict proof demanded.

13. After reasonable investigation and reflection, defendant can neither admit or deny the allegations of paragraph 13 without an extensive review of the origins, rationale and operation of the policy in question from the standpoint of prison security and general prison administration and the safe and effective operation of the LTSU program. Thus, they are denied and strict proof demanded.

14. After reasonable investigation and reflection, defendant can neither admit or deny the allegations of paragraph 14 without an extensive review of the origins, rationale and operation of the policy in question from the standpoint of prison security and general prison administration and the safe and effective operation of the LTSU program. Thus, they are denied and strict proof demanded.

15. Admitted.

16. This paragraph is a conclusion of law to which no response is required or if deemed factual is denied and strict proof is demanded.

17. This paragraph is a conclusion of law to which no response is required or if deemed factual is denied and strict proof is demanded.

18. Admitted.

19. Admitted.

20 This paragraph is a conclusion of law to which no response is required or if deemed factual is denied and strict proof is demanded.

21. All remaining paragraphs are conclusions of law to which no response is required or if deemed factual are denied.

SECOND DEFENSE

To the extent plaintiff seeks relief from the defendant in his official capacity for claims in the nature of constitutional violation, it is barred by the Eleventh Amendment.

THIRD DEFENSE

At no time has the defendant, either individually or in concert, deprived or sought to deprive the plaintiff of any right, privilege, or immunity secured to him by the Constitution or laws of the United States.

FOURTH DEFENSE

Defendant has at all times relevant to the subject matter of plaintiff's complaint acted in good faith with a reasonable belief in the lawfulness of his actions.

FIFTH DEFENSE

Defendant is entitled to qualified immunity.

SIXTH DEFENSE

The claims against defendant do not fall within the nine (9) categories enumerated by § 522 of Act 152, 42 Pa. C.S.A. § 8522, and are also barred by the Doctrine of Sovereign Immunity and Official Immunity.

SEVENTH DEFENSE

The defendant was at all times material acting pursuant to duty required by statute or statutorily authorized regulations, and therefore, said acts were within the discretion granted to him by state or statutorily authorized regulations.

EIGHTH DEFENSE

The complaint fails to state a claim upon which relief can be granted

NINTH DEFENSE

Any injuries received by plaintiff as are alleged in his complaint were the result of the actions of the plaintiff and the defendant cannot be held liable therefor.

WHEREFORE, defendant requests judgment in his favor and against plaintiff.

Respectfully submitted,

D. MICHAEL FISHER
Attorney General

By: Kemal Alexander Mericli

Kemal Alexander Mericli
Senior Deputy Attorney General
PA I.D. #27703

Susan J. Forney
Chief Deputy Attorney General
Chief, Litigation Section

OFFICE OF ATTORNEY GENERAL
6th Floor, Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219

Date: January 9, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD BANKS, of himself and on behalf of all similarly situated prisoners who are confined or will be confined in Long Term Segregation Units of State Prisons located in the Western Judicial District of Pennsylvania,	)	
Plaintiff,	)	
v.	)	Civil Action No. 01-1956
JEFFREY BEARD, in his official capacity as Secretary of the Pennsylvania Department of Corrections,	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Defendant's Answer to Complaint was served upon the following via first-class mail on January 9, 2002.

Jere Krakoff, Esquire
1705 Allegheny Building
Pittsburgh, PA 15219

Kamal Alexander Mericli
Senior Deputy Attorney General

OFFICE OF ATTORNEY GENERAL
6th Floor, Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219
Date: January 9, 2002

LONG TERM SEGREGATION UNIT

(LTSU)

RULES AND REGULATIONS

INMATE COPY

WHILE HOUSED IN THE LONG TERM SEGREGATION UNIT YOU ARE EXPECTED TO ADHERE TO THE RULES, REGULATIONS AND SCHEDULES CONTAINED HEREIN.

REVISED: JANUARY 2001

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LONG TERM SEGREGATION UNIT
JANUARY 2001

A. Purpose

The LTSU is an area consisting of maximum security housing coupled with extremely limited programming and privileges. You were referred for placement in the LTSU by either your parent institution or SMU. Placement criteria include but are not limited to: failure to complete an SMU program or failure to make adequate progress; demonstrated inability or unwillingness to conform to the requirements of general population; continued manifestation of a negative influence on the safety and security of the PA Department of Corrections; or participation in criminal activities which may threaten the community.

Final determination for placement is made by the Executive Deputy Secretary. Placement is anticipated to be long term, though progress reviews are conducted every 30 days.

Release from the LTSU will be determined by the Executive Deputy Secretary and will be based upon your positive adjustment. Unit staff will provide you with additional guidance.

B. Staffing

Superintendent – Phillip Johnson
Superintendent Assistant (Grievance Coordinator) – Tim Collins
Deputy Superintendent for Facility Management – William S. Stickman
Deputy Superintendent for Centralized Services – Mark A. Krysevig
Deputy Superintendent for Internal Security – Joel S. Dickson
LTSU Lieutenants – Lt. Anthony Bovo and Lt. Greg Mohring
Unit Manager – Rebecca Kessler
Counselors – Nick Bachism and Ken Martin
Psychology – Sandra Vujnovic
Hospital Administrator – Joan Delie
Chaplain – Father Terza
Librarian – Katherine Manners
CCPM – Debra Sauers
Inmate Accounting – Diane Detwiler
Business Manager – Paula Toski
Mail Department – Tonya Edwards
Parole – Dan Fedeanis
Major of the Guard – James McFetridge
Major of Unit Management – Chris Montenaro

C. General Rules

1. Privileges/Programming

a. Level 2

Level 2 is the most restrictive level of confinement and provides the least amount of privileges/programming. All new receptions begin on Level 2 for a minimum of 90 days. Inmates serving DC time will remain on Level 2 until they have completed their time or have had their remaining time set aside. Privileges afforded Level 2 inmates are as follows:

(1.) In cell activities

(2.) In cell counseling services

(3.) Employment as a unit janitor if approved by Unit Management Team

(4.) 1 Hour, 5 days per week of outside yard

(5.) Recreational and legal law library services

(6.) Legal and personal correspondence

(7.) In cell religious visits by a Chaplaincy

(8.) Three (3) showers per week

(9.) One (1) visit, non-contact, immediate family only, per month

(10.) Emergency phone calls only once approved and verified by Unit Management Team

b. Level 1

Level 1 provides for increased programming and privileges. They are available to those inmates who have demonstrated a satisfactory adjustment at Level 2. No DC cases can be placed in Level 1. Level 1 shall be the least restrictive available in the LTSU. In addition to those available to Level 2 inmates, the following privileges/programming will be available to Level 1 inmates (See Attachment A)

(1.) Two (2) visits, non-contact, immediate family only, per month

(2.) One (1) fifteen (15)-minute telephone call per month

(3) Commissary purchases of five dollars ($5 00) per week* (*Allowable items will be defined by PRC)

(4) Five (5) magazines, one (1) newspaper (daily exchange) and leisure books as determined by the Unit Management Team

(5) Programming In cell study (G E D. and Special Education only)

(6) Additional privileges/cell property may be authorized at the discretion of the Unit Management Team or PRC

c. Suspension of Privileges

Inmates may lose any privileges if their behavior is deemed to warrant such loss. This will be accomplished via Unit Team action, in response to a DC-134 report or misconduct, and shall be documented in the DC-14. The Unit Team shall have total authority regarding what privileges and for what period the privileges shall be forfeited These actions shall be administrative in nature.

2 Property

Inmate property of those admitted to the LTSU will be controlled in the following manner:

a No item made partially or entirely of glass will be permitted to be maintained by an LTSU inmate in his cell.

b. Any item of inmate property may be confiscated from an LTSU inmate if the inmate is using or altering the property in such a way that it is considered a threat to the safety and security of the institution

c. Indigent LTSU inmates may request stationary supplies should submit a request slip to the Unit Lieutenant. He/she will forward it to the Institutional Business Manager for verification Flexible security pens will be issued by unit staff.

d. The LTSU Sergeant or Lieutenant will ensure that the inmate is provided the essential articles for proper hygiene and comfort These articles will be supplied from the LTSU supplies when necessary

The items will include:

(1.) Coveralls (1 pair)
(2.) Underclothing (3 Shorts, 3 T-Shirts)
(3.) Socks (3 pairs)

(4) Bedding (1 Pillow Case, 2 Sheets, 1 Blanket)
(5) Personal Hygiene Essentials
(6) Towel and Washcloth

In addition the inmate may retain

(1) One (1) Box of legal and/or religious material
(2) One (1) Tablet of writing paper
(3.) Ten (10) Envelopes
(4.) One (1) Wedding band (no other jewelry)
(5.) One (1) Pair shower shoes
(6) Ten (10) Personal letters (photos will be confiscated and stored with inmate property.
(7.) Personal items (glasses, dentures, address book, etc.)

3 Visiting

The number of visitors permitted at any given time is limited to two (2) This may be two (2) adults or one (1) adult and one (1) child under the age of eighteen (18) The Shift Commander has the discretion to permit additional visitors such as small children and/or infants on a case-by-case basis Visiting hours are 8 00 AM to 3.30 PM, Monday through Friday

a Level 2

One non-contact weekday visit (of at least one hour) is permitted per month with immediate family only No holiday visits are permitted

b. Level 1

Two (2) non-contact weekday visits (of at least one hour) per month with any approved visitor is authorized No holiday visits are permitted

c. Legal visits are unlimited in number but are subject to space availability

4. Religious Privileges

Inmates confined in the LTSU are not permitted to attend religious services in the Chapel Inmates in LTSU shall be visited by a Facility Chaplain on a daily basis, when available in the facility and weekly by a Chaplain of the inmate's faith, if available.

5. Mail and Incoming Publications

a. All mail for inmates housed in the LTSU will be handled in accordance with **DC-ADM 803, "Inmate Mail and Incoming Publications."**

(1.) Incoming mail will be delivered to the LTSU each day that the mailroom is in operation and distributed to LTSU inmates by LTSU officers

(2.) Legal mail will be logged noting both the receiving inmate's name and number and the sender's name, address, date and time delivered. Legal mail will be opened in the presence of the inmate by the LTSU officers. The legal mail will be inspected for contraband but not read.

(3.) All regular mail will be inspected for contraband in the mailroom prior to delivery to the LTSU.

(4.) Inter-Institution mail, which arrives in the LTSU in a sealed envelope, will be treated as legal mail and opened and inspected in the presence of the inmate.

b. All outgoing mail is to be given to the Officer when the morning Food Trays are picked up. This also includes Request Slips and other correspondence to Staff.

6. Barber Services

All inmates are required to maintain grooming standards in accordance with Department policy DC-ADM 807, "Inmate Hygiene and Grooming."

LTSU inmates will be eligible for a haircut once each thirty (30) days.

When your pod is eligible you will be notified to sign up on the 2-10 Shift, and you will receive your haircut the following day.

7. Exercise

Inmates shall be permitted one (1) hour, five (5) days per week. All LTSU inmates will be exercised individually. Before leaving your cell, you will be strip searched. You will then be handcuffed behind your back and escorted to the yard. You will not be moved until properly secured. You are not permitted to take any thing with you to the yard.

On scheduled days, Block Officers will compile a list of inmates desiring to take yard, shower, or shave using the DC-707. Inmates must give a clear verbal or physical response for accepting or refusing the service.

8. Showers

Inmates in the LTSU will be offered a minimum of three showers per week absent any activity restriction.

You will be limited to ten (10) minutes per shower. Towel, shampoo and soap only will be permitted in the shower. You are not permitted to do laundry in the shower. No clothing will be worn to the shower. Shower schedules are Monday, Wednesday and Friday.

9. Shaving Privileges

Inmates in the LTSU will be offered a minimum of three opportunities to shave a week, absent any activity restriction.

Shaving kits will be passed out and collected the same day. Any damage to these items will result in a Misconduct and possible loss of shaving privileges.

COMMISSARY: (LEVEL I ONLY)	You will be permitted to purchase commissary bi-weekly. You will only be permitted to purchase items approved by PRC. You are not permitted to stockpile commissary items in your cells.
COMMISSARY SCHEDULE:	Every Other Tuesday – Slips passed out (AM) Following Day Wednesday – Slips picked up (AM) Following Tuesday – Commissary passed out (AM)
SICK CALL:	Fill out an Inmate Request Slip stating what it is you need to see the doctor for. Drop in Sick Call Box in the hallway on your way to Yard or give it to the Nurse.
LINEN AND JUMPSUITS:	Laundry services shall be provided on a weekly basis. Linen and towels shall be exchanged on Wednesday during the 2-10 shift. Issued linens include: one (1) towel, two (2) sheets, one (1) pillowslip and one (1) blanket. The Blanket provided is laundered once per year (minimum). Jumpsuits will be exchanged twice per week on Tuesdays and Fridays. Laundry bags will be given out for personal clothing. Bags will be picked up on Thursdays and returned on Mondays. All linen and clothing shall be used for its intended purpose only and not for curtains, rugs, or decorations. Any misuse of these items, alteration, tampering, or destruction shall result in a misconduct.

CUPS/SPOONS: Cups and spoons will be exchanged daily. All cups and spoons will be exchanged for new ones on a one for one basis. They will be passed out with the morning meal and collected following the evening meal.

LIBRARY: The inmate fills out an RHU Library Book Request Slip (attached) and passes it to a block officer to place in the in-house mail. You are permitted two leisure books at one time. You must return a book you have out to receive an additional book.

LAW LIBRARY: You must fill out an Inmate Request Slip, stating you wish to use the Law Library. Use will be granted on a First Come First Served Basis. You may use the Law Library for two (2) hours.

SMOKING/TOBACCO: No smoking tobacco products, smokeless tobacco or flame producing materials in the RHU/LTSU.

10 Changes in Levels

a. Upon reception into the unit, you will undergo an evaluation by the Unit Management Team who will communicate a baseline of behavior expectations.

b. The Unit Team shall develop a new Prescriptive Program Plan at that time. New Prescriptive Program Plan will be developed after each 30 days review.

c. The following factors will be considered prior to advancement to the next level:

(1.) Time in level.

(2.) Continued facility risk on or off the LTSU.

(3.) Number, type, and frequency of misconducts.

(4.) Involvement in self-improvement activities;

(5) Block behaviors

(a) quarters sanitation,

(b) personal hygiene and grooming,

(c) response to verbal and written orders,

(d) response to authority,

(e) interaction with other inmates,

(f) completion of specific goals as set by Unit Team;

(g.) demeanor with staff on the block and at periodic reviews

(h) work performance

d All movement from level 2 to level 1 will be through staff action by the Unit Team and documented by a vote sheet with final approval by the Superintendent

e The Facility Manager, upon the recommendation of both the LTSU Unit Manage-ment Team and the PRC, may temporarily "set aside" the inmate's accumulated DC time, assaultive and non-assaultive, to allow the inmate to advance to Level 1 Time set aside may de done in steps, particularly with those inmates who have substantial DC time to serve.

(1.) The PRC may continue to reduce the permanent DC time for non-assaultive misconducts, which has been "set aside," at periodic reviews.

(2) If an inmate successfully completes the LTSU program, any "set aside" DC time shall be eliminated

(3) While assigned in the LTSU, an inmate shall continue to receive a credit towards DC time to be served

(4) If the inmate receives a misconduct while in the LTSU or does not complete the program, any remaining DC time shall be reinstated.

f Inmates can be demoted by the same procedure. However, if an inmate is found guilty of a misconduct for which a period in disciplinary custody is the penalty, the inmate shall automatically be demoted back to Level 2, and any DC time which was previously set aside shall be restored

g Inmates may be considered for release at any time and at least annually. The Unit Team and Facility Manager will forward recommendations to the Regional Deputy Secretary. Final approval is by the Executive Deputy Secretary.

h. Release can be to a SMU, RHU, general population or other appropriate facility depending on the specific needs of the inmate.

11 Counts

a All inmate counts will be conducted in accordance with Department Policy 6.3.1.

b. Seven routinely scheduled counts shall be taken daily. You are required to stand and be in clear view during the following counts: 0600, 1230, 1530 and 2100

12 Cell Searches/Security Inspections/Cell Rotation

a All cells shall be subjected to a security inspection at least three times per week

b All cells shall be thoroughly searched at least once per week

c. All inmates will be required to change cells monthly

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS
SCI-Pittsburgh
412-761-1955

June 4, 2001

SUBJECT: ADDENDUM TO LTSU INMATE HANDBOOK
RE: IN-CELL PROGRAMMING

TO: All LTSU Inmates

FROM: Joey S. Dickson
Deputy Superintendent
Internal Security

BY: Debra K. Sauers
Corrections Classification & Program Manager

In-cell programming is available to Level 1 LTSU inmates. Level 1 inmates who are interested in participating should discuss this with their counselor. The unit management team will recommend participation to the PRC. PRC will review and approve or disapprove the recommendation.

Programming is currently available in the following areas: substance abuse; anger/violence management, life skills; parenting skills; and effective emotional expression.

Inmates may participate in one program at a time. Upon completion of a program, another program may be recommended for approval.

JSD/DKS.lp

cc: Superintendent Johnson
Deputy Stickman
Deputy Krysevig
Major McFetridge
Major Montenaro
RHU Lieutenants
A-3 Sergeants
File (2)

LTSU RULES:

1	You must have your jumpsuit all the way on any time you are out of your cell. The ONLY exception will be going to and coming from the shower. You are NOT PERMITTED to wash your laundry in the shower.
2	You are NOT PERMITTED to pass, pick up or trade off any materials or items while you are housing in this Unit. Doing so will result in a Misconduct.
3	You are NOT PERMITTED to cover your cell door. Also, you are NOT PERMITTED to cover, block or attach anything to the cell light fixture or air vent.
4	You are NOT PERMITTED to have anything attached to the walls of your cell. This includes, but is not limited to Pictures, Posters, Cards, etc.
5	Defacing any part of the cell by writing, drawing or any other method will not be permitted. This includes: Lights, Desk, Cabinet, etc.
6	Loud talking or yelling from cell to cell WILL NOT BE PERMITTED at any time.
7	It will be your responsibility to maintain your cell in a clean and orderly manner. You will be issued cleaning materials once a week for this purpose. Proper care and attention to State Property such as: Mattress, Pillow, Sheets, Towels, Jumpsuits, etc. must be exercised.
8	You will be permitted only State issued clothing while housed in the Unit. This will consist of: one (1) pair of State "Sneakers", three (3) pairs of underwear, three (3) pairs of socks, three (3) T-shirts and one (1) jumpsuit.
9	You are not permitted to throw anything out of your cell. Trash will be collected periodically by the Block Officer on a schedule to be determined. Anyone throwing food from the Food Trays, will be fed with inserts only, and will receive a Misconduct.
10	In order to facilitate being searched upon leaving your cell, you MUST PLACE YOUR HANDS BEHIND YOU TO BE HANDCUFFED. You will step out of your cell to be Searched. When returning from the Exercise Yard, you will enter your cell and place your hands through the Food Slot to be uncuffed. You will remain fully dressed at all times.
11	Whenever you are out of the Unit, you will not attempt to introduce any contraband into the Unit upon your return. This includes ANYTHING that was not in your possession when you left the Unit.
12	Under NO CIRCUMSTANCES are you to mark, write on, or otherwise deface or damage the Food Trays provided to you.
13	You are required to stand and be in Clear View of the Officers during the following Security Checks (COUNTS): 0600, 1230, 1530, 2100
14	If you receive a Newspaper, you must turn in the whole Newspaper from the prior day (e.g. to get Tuesday's paper, you must turn in Monday's Newspaper).

NOTE:	ANY NON-COMPLIANCE WITH THE AFOREMENTIONED REGULATIONS WILL SUBJECT YOU TO DISCIPLINARY ACTION. YOU ARE TO OBEY ANY ORDER GIVEN TO YOU BY A STAFF MEMBER. EVEN THOUGH IT MAY, AT TIMES, CONFLICT WITH THE SCHEDULE AND/OR REGULATIONS AS STATED.

JSD/cr

Joel S. Dickson
Deputy Superintendent for Internal Security

I HAVE READ AND UNDERSTAND THE ABOVE SCHEDULE.

_____ / _____ _____
Inmate Signature DC Number Date

_____ _____
Witness (Officer) Signature Date

LONG TERM SEGREGATIO NIT PRIVILEGES

	PRIVILEGES		PROGRAM SERVICES	
LEVEL II	Smoking:	None	Medical/Dental:	Screened on Unit
	Visits:	One (1) per month, non-contact weekdays only, immediate family Legal are unlimited	Mental/Health:	Seen on unit.
	Exercise	One (1) hour per day, five (5) days per week	Religious:	Cell visits by Chaplains
	Telephone:	Emergency only		
	Radio/Tv:	None	Counseling:	In cell
	Commissary:	None	Activities:	In cell
	Legal/Religious Materials:	One (1) records center box	Education:	None
	Mail:	Legal and personal correspondence	Employment:	Unit Janitor
	Personal Property	Shower shoes, dictionary, ten (10) letters, eyeglasses, address book, and dentures	Library:	Two (2) leisure books at a time
	Showers:	Three (3) per week	Pay:	None
LEVEL I	Smoking:	None	Medical/Dental	Screened on Unit
	Visits:	Two (2) per month, non-contact weekdays only, immediate family Legal are unlimited	Mental/Health:	Seen on Unit
	Exercise:	One (1) hour per day, five (5) days per week	Religious:	Cell visits by Chaplains
	Telephone:	One (1) fifteen (15) minute call per month (non accumulative)	Counseling:	In cell
	Radio/Tv	None	Activities:	In cell
	Commissary:	Five dollars ($5.00) per week. ($10.00 every two weeks) (Items as defined by the Unit Team)	Education:	GED and Special Education, in cell study only
	Legal/Religious Materials:	One (1) records center box		
	Mail:	Legal and personal correspondence, five (5) magazines, one (1) newspaper (daily exchange)	Employment:	Unit Janitor
	Personal Property	Shower shoes, dictionary, ten (10) letters, eyeglasses, address book, and dentures	Library:	Two (2) leisure books at a time
	Showers:	Three (3) per week	Pay:	As per DC 910 Inmate Compensation System

6.5.1, Administration of Security Level 5 Housing Units, Section 3, Long Term Segregation Units — *Attachment A*

COMMONWEALTH OF PENNSYLVANIA
Department of Corrections
SCI-Pittsburgh, Internal Security
(412) 761-1955 Ext 218
February 8, 2001

SUBJECT: "GRATERFRIENDS"

TO: LTSU Inmates

FROM: Joel S. Dickson
Deputy Superintendent for Internal Security

The publication "GRATERFRIENDS" is characterized as a newsletter It is not legal mail. As such, it is denied to Level 2 inmates and permitted for Level 1 inmates

JSD/cr

cc. Superintendent Johnson
Deputy Stickman
Deputy Krysevig
Ms. Rebecca Kessler
RHU Lieutenants
Mailroom

RT II

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS
P O BOX 598
CAMP HILL, PA 17001

[redacted]ICIAL INMATE GRIEVANCE
[redacted]IAL REVIEW RESPONSE

GRIEVANCE NO PIT-0493-01

[redacted] (Name & DC No.)	FACILITY	HOUSING LOCATION	GRIEVANCE DATE
[redacted] Ronald Banks, DZ-5843	SCI-Pittsburgh	A3 B-1006	4/25/01

[redacted]ollowing is a summary of my findings regarding your grievance

[redacted]tems that were confiscated were deemed not to be religious material by Deputy Dickson and the [redacted]plancy Department. You are currently a Level 2 in the LTSU and are not permitted magazines or [redacted]ewspapers.

RECEIVED
SCI-PITTSBURGH
MAY 02 2001
SUPERINTENDENT
ASSISTANT II

Posted
MAY 02 2001
SCI Pittsburgh

Supt. Johnson/File
Lt. Mohring
DC-15
Inmate

[redacted] Print Name and Title of Grievance Officer	SIGNATURE OF GRIEVANCE OFFICER	DATE
[redacted] Lt.	Carol A Beers	5-2-01

WEEKLY BOOK DELIVERY SCHEDULE FOR A-3

August 2002

FROM: JAMES WEST

Monday	Tuesday	Wednesday	Thursday	Friday
NOTE: NEW REQUESTS FOR BOOKS MUST BE RECEIVED MONDAY MORNING TO INSURE THURSDAY BOOK DELIVERY.			1	2
5 NEW BOOK REQUESTS DUE FOR AUGUST 8TH DELIVERY	6	7	8 BOOK DELIVERY	9
12 NEW BOOK REQUESTS DUE FOR AUGUST 15TH DELIVERY	13	14	15 BOOK DELIVERY	16
19 NEW BOOK REQUESTS DUE FOR AUGUST 22ND DELIVERY	20	21	22 BOOK DELIVERY	23
26 NEW BOOK REQUESTS DUE FOR AUGUST 29TH DELIVERY	27	28	29 BOOK DELIVERY	30

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17-1[illegible] ASHINGTON ST. FAX/201/569-85[illegible]
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RENEWAL LIST NO	3292	9
ACCT NO	IN-05-5-85855-09	
RG DATE	DEC 20, 2001	

6000-12462

TITLE CODE	QTY	NAME OF PUBLICATION	FOR	STARTING	★ PRICE UNIT	★ PRICE EXTENSION
THIS RENEWAL LIST INCLUDES ALL SUBSCRIPTION ORDERS PLACED WITH THE PUBLISHERS BY EBSCO AS YOUR AGENT AND INVOICED THROUGH 11/21/2001. IF A RECENT CHANGE IN YOUR RENEWAL LIST, SUCH AS CANCELLATION OR ADDITION DOES NOT APPEAR, IT MISSED THE RENEWAL LIST PRODUCTION CUT-OFF DATE INDICATED ABOVE. THESE CHANGES ARE RECORDED IN OUR FILE AND WILL BE INCORPORATED INTO YOUR RENEWAL INVOICE. SEND TO - 30-10 STATE CORR INSTITUTE SCIP LIBRARY 3001 BEAVER AVE PITTSBURGH PA 15233 TERM SHOWN BELOW WILL BE ORDERED NONCANCELLABLE APPLIES AFTER RENEWAL ORDER IS PROCESSED						
311361115 *(00859)	1	ERIE TIMES NEWS /MON-SAT/ /BY MAIL/ /ALL EXC CERTAIN ZIP CODES/ **OR** /INCORPS/ ERIE MORNING NEWS 8916857	1 YR	01-01-2002	16600	16600
377351062 *(00860)	1	GREENSBURG TRIBUNE REVIEW /DAILY & SUNDAY/ /BY MAIL/ **OR** VOL/TITLE INFO NEEDED 8916857 PUB ID MD3284	1 YR	01-01-2002	24920	24920
596245878 *(00861)	1	MORNING CALL /DAILY AND SUNDAY/ /BY MAIL/ **L2** **DS** 8916857 PUB ID 9469626	1 YR	05-01-2002	41352	41352
627886003 (00862)	1	NEW PITTSBURGH COURIER - CITY EDITION **L1** **SW** PUBL WEDNESDAY & SATURDAY 8916857	1 YR	06-01-2002	4000	4000
~~638788008 (00863)~~	~~1~~	~~NEW YORK TIMES - METRO NY ED /INCLS/ SECTIONS 4 5 6 10 /7 DAY/ /BY MAIL/ **L1** **DS** /INCLS/ NEW YORK TIMES MAGAZINE COMBINATION VOL 106, 2002 8916857~~	~~1 YR~~	~~02-01-2002~~	~~56160~~	~~56160~~
636555085		~~PITTSBURGH - REGULAR ED /AM/~~	1 YR	04-01-2002	4200	4200
		E= 6 Q= 6 BL= 0 SO=				

PAID
CK NO 63666
DATE 3-19-02
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	ACCT NO	TN-DS-S-85055-00
AC	DATE	DEC 20, 2001

TITLE CODE	QTY	NAME OF PUBLICATION	FOR	STARTING	★ PRICE UNIT	★ PRICE EXTENSION
[redacted] (00064)	1	AC **WK** PUBL WEEKLY 8916857 (SP)				
543831308 (00065)	1	NOTICIAS DEL MUNDO /FOR US/ **DA** 8916857	1 YR	02-01-2002	12480	12480
[redacted] (00066)	1	PATRIOT NEWS C-W SUNDAY PATRIOT-NEWS **L1** COMBINATION 8916857 **DS**	1 YR	01-01-2002	32720	32720
39702009 (00067)	1	PHILADELPHIA DAILY NEWS /DAILY/ /BY MAIL/ **DA** PUBL MON THRU SAT 8916857	1 YR	01-01-2002	27500	27500
39775005 (00068)	1	PHILADELPHIA INQUIRER /SUNDAY/ /BY MAIL/ **SUN 8916857	1 YR	04-01-2002	17900	17900
39923001 (00069)	1	PHILADELPHIA TRIBUNE /ONCE A WEEK/ **WK** NONCANCELLABLE 8916857	1 YR	05-01-2002	3100	3100
698755543 (00070)	1	PITTSBURGH TRIBUNE REVIEW /DAILY & SUNDAY/ /BY MAIL/ **DS** 8916857 PUB ID M07502	1 YR	05-01-2002	24920	24920
39281001 (00071)	1	[redacted] DOMESTIC ED /**/ FOR US & POSSESSIONS ONLY/ SURFACE MAIL/ **OR** 8916857 (SP)	1 YR	06-01-2002	7613	7613
18170770 (00072)	1	USA TODAY /**/ /THE NATIONS NEWSPAPER/ /US LIBRARIES AND INSTITUTIONS ONLY/	1 YR	12-01-2001	12900	12900
		E= B Q= 8 BL= 0 SO= 0				

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YOUR PURCHASE ORDER NO	ACCOUNT NO	DATE	INV CODE	INVOICE NO	PAGE NO
1/24/02	TN-S-85055-00	04-11-2002		0943235	1

TITLE NUMBER	QTY	NAME OF PUBLICATION	TYPE	SUBSCRIPTION NUMBER	TERM		PRICE	EXTENSION
313361115	1	ERIE TIMES NEWS /MON-SAT/ /BY MAIL/ /ALL EXC CERTAIN ZIP CODES/ /INCORPS/ ERIE MORNING NEWS	DA	1165391	U 1 YR	R	16600	16600
377351002	1	GREENSBURG TRIBUNE REVIEW /DAILY & SUNDAY/ /BY MAIL/ VOL 117 STARTS 01-2002))*VOL 117 PID# M03284	DR	1165759	U 1 YR	R	24920	24920
596245878	1	MORNING CALL /DAILY AND SUNDAY/ /BY MAIL/ PID# 9469828	DS	1168894	U 1 YR	R	42352	42352
827806003	1	NEW PITTSBURGH COURIER - CITY EDITION PUBL WEDNESDAY & SATURDAY VOL 93 STARTS 06-2002	SW	1161134	U 1 YR	R	5000	5000
836555002	1	[illegible] - REGULAR ED /**/ 05-02 CLAIMS ACCEPTED FOR SPEC ED-YOUR CHILD "CORRECTED" CHART ONLY-COMPLETE CORRECTED VERSION MUST BE PURCHASED AS SINGLE ISSUE UNLESS SUB IS HOSPITAL OR DOCTORS OFFICE PUBL WEEKLY VOL 139 STARTS 04-2002	WK	1167152	U 1 YR	R	4200	4200
843831308	1	NOTICIAS DEL MUNDO /FOR US/ VOL 22 STARTS 02-2002	DA	1167224	U 1 YR	R	13480	13480
680226008	1	PATRIOT NEWS - MORNING-DAILY /COMES ALSO WITH/ SUNDAY PATRIOT NEWS PUBL DAILY EXCEPT CHRISTMAS NONCANCELLABLE	DA					
680226180	1	PATRIOT NEWS C-W SUNDAY PATRIOT-NEWS COMBINATION VOL 53 STARTS 01-2002	DS	1167444	U 1 YR	R	23380	23380
689702009	1	PHILADELPHIA DAILY NEWS /DAILY/ /BY MAIL/ PUBL MON THRU SAT	DA	1161583	U 1 YR	R	36100	36100
688775005	1	PHILADELPHIA INQUIRER /SUNDAY/ /BY MAIL/ PID# 47790283	SU	1167539	U 1 YR	R	17900	17900
689923001	1	PHILADELPHIA TRIBUNE /ONCE A WEEK/ NONCANCELLABLE CONTINUED ON NEXT PAGE	WK	1167540	U 1 YR	R	4100	4100

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NUMBER	QTY	NAME OF PUBLICATION	PER	SPECIAL INSTRUCTIONS TO SUBSCRIBER	START DATE		UNIT	EXTENSION
		VOL 117 STARTS 05-2002						
755543	1	PITTSBURGH TRIBUNE REVIEW /DAILY & SUNDAY/ /BY MAIL/ PID# M07502	DS	11875750	U 1 YR	R	24920	24920
					05/01/2002			
2081001	1	TIME - DOMESTIC ED /**/ /FOR US POSSESSIONS ONLY/ /SURFACE MAIL/ CLAIMS MUST BE MADE WITHIN 12ISS OF PUBL DATE/AFTER 12ISS THE SINGLE ISSUE PRICE IS CHARGED/NO SUBS EXTENDED FOR OUT OF STOCK ISSUES MUST CLAIM BY MONTH DAY & YEAR	DR	11828440	U 1 YR	R	7813	7813
					06/01/2002			
		VOL 180 STARTS 08-2002						
70770	1	USA TODAY /**/ /THE NATIONS NEWSPAPER/ /US LIBRARIES AND INSTITUTIONS ONLY/ /SURFACE MAIL/ PUBL MONDAY THRU FRIDAY EXCEPT MAJOR HOLIDAYS	DA	11883800	U 1 YR	R	12900	12900
					12/01/2001			
		VOL 20 STARTS 12-2001						
70284	1	EL VOCERO DE PUERTO RICO	DA	11831880	U 1 YR	R	25000	25000
					07/01/2002			
		PLEASE SUPPLY YOUR TAX EXEMPT #						

INVOICE SUBTOTAL		2584 45
SERVICE CHARGE		103 38
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RHU LIBRARY BOOK REQUEST SLIP

LAST NAME _____ FIRST NAME_____

DOC#_____ CELL_____

INDICATE SELECTIONS BELOW.

__GENERAL FICTION	__SCIENCE FICTION	__WESTERNS
__FANTASY	__ROMANCE	__SPANISH FICTION
__PHILOSOPHY	__RELIGION	__LANGUAGE
__SCIENCE	__ARTS	__LITERATURE
__HISTORY	__GEOGRAPHY	__BIOGRAPHY
__SPANISH NON-FIC.	__ _____	

(REFERENCE MATERIALS DO NOT CIRCULATE.)

SPECIFIC TITLES THAT YOU ARE REQUESTING

1._____

2._____

3._____

YOU WILL NOT RECEIVE MATERIALS UNTIL ALL PREVIOUSLY CHECKED OUT MATERIALS ARE RETURNED. ONLY PAPERBACKS WILL BE SENT TO THE RHU. IF YOUR SELECTION IS NOT AVAILABLE, A SUBSTITUTION WILL BE MADE.

DO NOT WRITE BELOW THIS LINE!!

TITLES OF BOOKS SENT DUE_____

1._____

2._____

3._____

INMATE SIGNATURE & NUMBER_____

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027751858 (00001)	1	AIR & SPACE SMITHSONIAN /**/ **BM** SUB INCLS MEMBERSHIP IN NATIONAL AIR AND SPACE MUSEUM MEMBERSHIP TITLE 8916819	1 YR	01-01-2002	2200	2200
071685002 (00002)	1	ARCHITECTURAL DIGEST /**/ /SURFACE MAIL/ **L1** **MO** 8916819 (SP)	1 YR	04-01-2002	3995	3995
083560680 (00003)	1	ARTISTS MAGAZINE /**/ **MO** 8916819 (SP)	1 YR	04-01-2002	2600	2600
107759003 (00004)	1	BASEBALL DIGEST /**/ **L1** **MO** 8916819 (SP)	1 YR	01-01-2002	2394	2394
108243007 (00005)	1	BASKETBALL DIGEST /**/ /SURFACE MAIL/ **L1** **MO** PUBL JAN FEB MAR APR MAY JUN NOV DEC 8916819 (SP)	1 YR	12-01-2002	2394	2394
124875006 (00006)	1	BLACK ENTERPRISE /**/ **MO** NONCANCELLABLE PUBLISHER WILL NOT ISSUE A REFUND FOR DUPLICATE ORDERS OF $2.00 OR LESS. 8916819 (SP)	1 YR	06-01-2002	1795	1795
125137000	1	BLACK SCHOLAR	1 YR	01-01-2002	8500	8500
		E= 7 Q= 7 BL= 0 SO=	0			

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AA	DATE	DEC 20, 2001

TITLE CODE	QTY	NAME OF PUBLICATION	FOR	STARTING	★ PRICE UNIT	★ PRICE EXTENSION
(00007)		AA **LI** **QR** PUBL WITHIN SEASONS VOL 32 2002 8916819 (SP)				
180346009 (00008)	1	CAR CRAFT MAGAZINE /**/ **MO** /INCORPS/ MUSCLE CAR REVIEW 8916819 (SP)	1 YR	06-01-2002	1500	1500
180379000 (00009)	1	CAR AND DRIVER /**/ /SURFACE MAIL/ **MO** 8916819 (SP)	1 YR	04-01-2002	2200	2200
197693005 (00010)	1	CHESS LIFE **LI** NONCANCELLABLE VOL 57 2002 8916819 (SP) **MO**	1 YR	03-01-2002	3000	3000
210587515 (00011)	1	CIVILIZATION /DISCONTINUED EFF OCT 2000/ **BA** PUBL JAN MAR MAY JUL SEP NOV 8916819	DISCONTINUED***			
234883858 (00012)	1	CONSUMER REPORTS /**/ **IR** /INCLS/ CONSUMER REPORTS BUYING GUIDE IN DECEMBER CONSUMER REPORT PUBL MO WITH BUYING GUIDE PUBL DEC COMBINATION 8916819 (SP)	1 YR	02-01-2002	2600	2600
242696003 (00013)	1	COUNTRY SONG ROUNDUP /DISCONTINUED/ **QR** PUBL JAN APR JUL OCT 8916819	DISCONTINUED***			
254699002 (00014)	1	CYCLE WORLD /**/ /SURFACE MAIL/ **MO** /INCORPS/ CYCLE 8916819 (SP)	1 YR	05-01-2002	2200	2200
		E= 7 Q= 7 BL= 0 SO= 0				

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		AA				
267392298 (00015)	1	DETAILS MAGAZINE /**/ **LI** 8916819 **R0R** (SP)	1 YR	03-01-2002	1500	1500
277315162 (00016)	1	DISCOVER /**/ 8916819 **M0** (SP)	1 YR	05-01-2002	2995	2995
281742510 (00017)	1	DOWN BEAT /**/ /SURFACE MAIL/ NONCANCELLABLE 8916819 **M0** (SP)	1 YR	05-01-2002	3500	3500
288308000 (00018)	1	EBONY /INCORPS/ EM /EBONY MAN MAGAZINE/ /**/ /SURFACE MAIL/ VOL 57, 2002 CANCELLATIONS ACCEPTED ONLY IN CASE OF DUPLICATE ORDERS OR CLOSING OF A SCHOOL - REQUESTS HAVE TO BE SUBMITTED PRIOR TO MAILING OF THE FIRST ISSUE 8916819 **M0** (SP)	1 YR	06-01-2002	2200	2200
314164005 (00019)	1	ESQUIRE /**/ **LI** 8916819 **M0** (SP)	1 YR	07-01-2002	1594	1594
314562000 (00020)	1	ESSENCE /**/ 8916819 **M0** (SP)	1 YR	06-01-2002	2200	2200
346909005 (00021)	1	FOOTBALL DIGEST /**/ **LI** PUBL MONTHLY WITH MAY/JUN AND JUL/AUG ISSUES COMBINED 8916819 **I0R** (SP)	1 YR	02-01-2002	2394	2394
347436008 (00022)	1	FORBES /**/ /INCLS/ FORBES ASAP/ FORBES FYI/ FORBES MAGAZINE ANNUAL REPORT ON AMERICAN INDUSTRY FORBES 400 IS OCT ISS - FORBES ANNUAL DIRECTORY IS APR ISS COMBINATION **BW**	1 YR	01-01-2002	5995	5995

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		AA 8916819 (SP)				
350466009 (00023)	1	FORTUNE - DOMESTIC ED /**/ /FOR US/ **BW** 8916819 (SP)	1 YR	01-01-2002	6995	6995
374279743 (00024)	1	GQ - US EDITION /**/ /SURFACE MAIL/ **L1** **MO** 8916819 (SP)	1 YR	06-01-2002	2000	2000
389368002 (00025)	1	HEAVY METAL **BM** PUBL JAN MAR MAY JUL SEP NOV 8916819 BR1 2001	1 YR	04-01-2002	1795	1795
396467003 *(00026) F	1	HOLA /SURFACE MAIL/ **WK** PUBL ON THURSDAY 8916819 (SP)	1 YR	06-01-2002	17307	17307
455198820 (00027)	1	ISLANDS /**/ **IR** PUBL FEB MAR APR JUN AUG OCT NOV & DEC 8916819	1 YR	04-01-2002	2400	2400
462951005 (00028)	1	JET /**/ /SURFACE MAIL/ **WK** PUBL MONDAYS CANCELLATIONS ACCEPTED ONLY IN CASE OF DUPLICATE ORDERS OR CLOSING OF A SCHOOL - REQUESTS HAVE TO BE SUBMITTED PRIOR TO MAILING OF THE FIRST ISSUE 8916819 (SP)	1 YR	05-01-2002	3800	3800
464710342 (00029)	1	JOE WEIDERS MENS FITNESS /**/ /SURFACE MAIL/ **MO** NONCANCELLABLE 8916819	1 YR	01-01-2002	2197	2197
464717503 (00030)	1	JOE WEIDERS MUSCLE & FITNESS /**/ /CA/	1 YR	04-01-2002	3497	3497
		E= 8 Q= 8 BL= 0 SO=	0			

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		AA **MO** NONCANCELLABLE 8916819 (SP)				
517580908 (00031)	1	LATINA /NY//**/ **MO** 8916819 (SP)	1 YR	05-01-2002	2000	2000
524472115 (00032)	1	LIBRARY OF CONGRESS ASSOCIATES MEMBERSHIP /DISCONTINUED EFF OCT 2000/ **OR** 8916819	DISCONTINUED***			
611653007 (00033)	1	NATIONAL ENQUIRER /**/ **L1** **WK** 8916819	1 YR	04-01-2002	5696	5696
612117002 (00034)	1	NATIONAL GEOGRAPHIC /**/ /FOR US & SOUTH AMERICA/ **L1** **MO** /COMES ALSO WITH/ NATL GEOGRAPHIC SOC MEMBERSHIP 8916819 (SP)	1 YR	02-01-2002	3400	3400
667791008 (00035)	1	OUTDOOR LIFE /**/ **IR** PUBL MONTHLY WITH JUN/JUL & DEC/JAN ISSUES COMBINED 8916819 (SP)	1 YR	06-01-2002	1197	1197
681727002 (00036)	1	PEOPLE WEEKLY /**/ /FOR US/ /SURFACE MAIL/ **WK** 8916819 (SP)	1 YR	07-01-2002	11395	11395
689791002 (00037)	1	PHILADELPHIA MAGAZINE /**/ **MO** /INCLS/ PHILADELPHIA MAGAZINES MID-ATLANTIC TRAVEL COMBINATION 8916819	1 YR	02-01-2002	1800	1800
698653003 (00038)	1	PITTSBURGH MAGAZINE /US ONLY/ /INCORPS/ PITTSBURGH PROSPECTS **MO**	1 YR	01-01-2002	1795	1795
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		AA REFUNDS ONLY GIVEN WITHIN 6 MOS ON AN 1YR SUBSCRIPTION 8916819 (SP)				
708127006 (00039)	1	POPULAR MECHANICS : ENGLISH EDITION /**/ **L1** **MO** 8916819 (SP)	1 YR	06-01-2002	21.97	21.97
708336006 (00040)	1	POPULAR SCIENCE /**/ **MO** 8916819 (SP)	1 YR	02-01-2002	19.95	19.95
711578062 (00041)	1	POWERLIFTING USA /FOR US/ **MO** /COMES ALSO WITH/ POWER HOTLINE 8916819	1 YR	01-01-2002	31.95	31.95
714240017 (00042)	1	PREMIERE /**/ /SURFACE MAIL/ **MO** 8916819 (SP)	1 YR	01-01-2002	22.00	22.00
715629002 (00043)	1	PREVENTION /**/ /SURFACE MAIL/ /ALL EXCEPT CANADA/ **L1** **MO** 8916819 (SP)	1 YR	01-01-2002	21.97	21.97
735846008 (00044)	1	PSYCHOLOGY TODAY /**/ **L1** **BM** CANCELLATIONS ARE ACCEPTABLE DURING THE FIRST 3 MONTHS OF THE SUBSCRIPTION TERM ONLY 8916819 (SP) ENGLISH EDITION (S)	1 YR	05-01-2002	21.00	21.00
753741008 (00045)	1	READING EAGLE /SUNDAY/ /BY MAIL/ **L1** **SU** 8916819	1 YR	03-01-2002	103.60	103.60
782788013 (00046)	1	RIGHT ON MAGAZINE /NY/ **MO** NONCANCELLABLE 8916819 (SP)	1 YR	08-01-2002	21.95	21.95
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		AA				
782962009 *(00047)	1	RING /NY/ /RENEWAL ORDERS ONLY/ /SURFACE MAIL/ **BA** 8916819 (SP)	1 YR	01-01-2002	1900	1900
787846002 (00048)	1	ROLLING STONE /**/ **BW** PUBL EVERY OTHER THURSDAY CANCELLATIONS NOT ACCEPTED AFTER FIFTEEN ISSUES HAVE HAVE BEEN SERVED 8916819 (SP)	1 YR	06-01-2002	1994	1994
795330265 (00049)	1	SALUDABLE /UNABLE TO CONTACT PUBL/ **MO** 8916819				
844535005 (00050)	1	SPORTING NEWS /**/ **OR** 8916819 (SP)	1 YR	04-01-2002	7800	7800
844927004 (00051)	1	SPORTS ILLUSTRATED /**/ /FOR US/ /SURFACE MAIL/ **DR** PUBL WEEKLY WITH SPECIAL ISSUES IN FEB & SEP 8916819 (SP)	1 YR	05-01-2002	8649	8649
918171828 (00052)	1	USA TODAY BASEBALL WEEKLY /US ONLY/ **WK** **RL** 8916819	1 YR	05-01-2002	3995	3995
924034358 *(00053)	1	UPSCALE /THE SUCCESSFUL BLACK MAGAZINE/ **IR** PUBL MONTHLY WITH DEC/JAN JUN/JUL SEP/OCT ISSUES COMB -8916819	1 YR	06-01-2002	1495	1495
932769680 (00054)	1	VIBE /**/ **AC** 8916819 (SP)	1 YR	05-01-2002	1195	1195
934579004	1	VILLAGE VOICE /INCORPS/ VLS	1 YR	02-01-2002	7900	7900
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(00055)		**ALI** AA **WK** VOL 67, 2002 8916819 (SP)				
955173000 (00056)	1	WHISPERING WIND **B*** PUBL FEB APR JUN AUG OCT DEC 8916819	1 YR	02-01-2002	2100	2100
981-106248 (00057)	1	ZIFF DAVIS SMART BUSINESS /**/ /SURFACE MAIL/ **MO** /FORMERLY/ ZIFF DAVIS SMART BUSINESS FOR THE NEW ECONOMY 8916819 (SP)	1 YR	08-01-2002	2000	2000
981-107345 (00058)	1	ZIFF DAVIS SMART BUSINESS FOR THE NEW ECONOMY /**/ /SURFACE MAIL/ **MO** /NOW CALLED/ ZIFF DAVIS SMART BUSINESS /EFF 05-01/ 8916819				
		PLEASE SUPPLY YOUR TAX EXEMPT #:				
		SHIP-TO SUB-TOTAL				190497

Time
Newsweek

E= 3 Q= 3 BL= 0 SO= 0

POLICY STATEMENT
Commonwealth of Pennsylvania • Department of Corrections

Policy Subject:		Policy Number:
Administration of Security Level 5 Housing Units		6.5.1
Date of Issue:	**Authority:**	**Effective Date:**
June 8, 2000	Martin F. Horn	September 1, 2000

I. AUTHORITY

The authority of the Secretary of Corrections to direct the operation of the Department of Corrections is established by Sections 201, 206, and 506 of the Administrative Code of 1929, Act of April 9, 1929, P L 177, 71 P S § 61, 66, and 186 as amended

II. PURPOSE

The purpose of this policy is to establish policy and procedure for the Administration of Security Level 5 Housing Units.

III. APPLICABILITY

This policy is applicable to all facilities within the Department of Corrections that operate a Security Level 5 Housing Units (e.g Restricted Housing Unit [RHU], Special Management Unit [SMU], and Long Term Segregation Unit [LTSU])

IV. DEFINITIONS

A. Administrative Custody (AC)

A housing status to which inmates are assigned for non-disciplinary reasons but requires closer supervision and control than is generally available in general population

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B. Custody Level 5 (CL 5)

A classification level to which inmates are assigned who have demonstrated, through a pattern of escapes or attempted escapes, maladjustive or assaultive behavior, or through a need for protection that they require a high degree of structure.

C. Custody Level 5H (CL 5H)

A custody level assigned to inmates who fail to complete the Special Management Unit program or who may be deemed of having serious behavioral problems and a high potential for repeating that behavior. Inmates with this classification are not viewed as viable candidates for release to general population, due to the following

1. they are a serious escape risk,
2. they have demonstrated assaultive behavior with the intent to cause death or serious bodily injury,
3. they have inflicted injury to staff and/or inmates,
4. they have engaged in a facility disturbance(s),
5. they have been, or are in the possession of, weapons and/or implements of escape,
6. they have a recorded history of:
   a. having or exerting negative influence in facility activities,
   b. being a member of a Security Threat Group or other unauthorized organization(s) as outlined in Department policy **6.3.1, "Facility Security"**; and/or
   c. being a sexual predator.

D. Disciplinary Custody (DC)

A housing status to which inmates are assigned, via sanction imposed by a Hearing Examiner, upon being found guilty of a Class I misconduct.

E. General Population

A housing status to which the majority of inmates are assigned who are not housed within a Restricted Housing Unit, Special Management Unit, Capital Case Unit, Mental Health Unit, Long Term Segregation Unit, Medical Infirmary, or Diagnostic Unit of a particular facility.

F. **Long Term Segregation Unit (LTSU)**

A housing unit or group of cells designated to house inmates classified as Custody Level 5H

G. **Restricted Housing Unit (RHU)**

A housing unit or group of cells designated to house inmates assigned to AC/DC status

H. **Security Level 5, Maximum**

Maximum security housing consisting of single or double occupancy cells with a secure control booth that has remote electronic locking capabilities

I. **Special Management Unit (SMU)**

A housing unit or group of cells designated to house inmates who are, or have been, disruptive or violent.

All other pertinent definitions are contained in the procedure manual for this policy.

POLICY

It is the policy of the Department to maintain Security Level 5 Housing Units in order to maintain the secure and orderly operation of the facility and to provide for the safety of the public, staff, and other inmates. A Security Level 5 Housing Unit is generally a Restricted Housing Unit (RHU), a Special Management Unit (SMU), or a Long Term Segregation Unit (LTSU).

PROCEDURES

1. All L5 receptions will be provided with a copy of the unit's inmate handbook within one (1) hour after reception or as soon thereafter as possible.. The handbook shall be readily available in both English and Spanish. If other language(s) are required, copies will be obtained and issued on an as needed basis.

2. Each inmate is required to sign for a numbered copy of the handbook and it will remain the property of the unit.

3. Each unit handbook shall contain the unit's rules and regulations and information pertaining to the units:

   a. daily and special routines;

   b. rules and regulations;

   c. management phases and progression (SMU and LTSU only);

   d. guidelines for disciplinary time reductions;

e types and frequency of inspections, and

f general and miscellaneous information

4 The handbook shall be reviewed/revised at least annually by the Deputy Superintendent for Facilities Management/Deputy Superintendent for Internal Security and Major-of-the-Guard

5 Inmates shall return the unit handbook when they are released

6 All operational procedures are contained in the procedure manual for this policy

7. All pertinent terms are contained in the glossary of terms section of the procedure manual for this policy

VII. SUSPENSION DURING AN EMERGENCY

In an emergency or extended disruption of normal facility operation, the Secretary, or designee may suspend any provision or section of this policy, for a specific period

VIII. RIGHTS UNDER THIS POLICY

This policy does not create rights in any person nor should it be interpreted or applied in such a manner as to abridge the rights of any individual. This policy should be interpreted to have sufficient flexibility so as to be consistent with law and to permit the accomplishment of the purpose(s) of the policies of the Department of Corrections.

IX. RELEASE OF INFORMATION AND DISSEMINATION OF POLICY

A. Release of Information

1. Policy

This policy document is public information and may be released to members of the public, staff, legislative, judicial, law enforcement and correctional agencies and/or inmates upon request.

2. Procedure Manual (if applicable)

The procedure manual for this policy is not public information and shall not be released in its entirety or in part, without the prior approval of the Secretary of Corrections or designee. This manual or parts thereof, may be released to any Department of Corrections employee on an as needed basis.

B. Distribution of Policy

1. General Distribution

The Department of Corrections' policy and procedure manuals (when applicable) shall be distributed to the members of the Central Office Executive Staff, all Facility Managers, and Community Corrections Regional Directors on a routine basis Distribution to other individuals and/or agencies is subject to the approval of the Secretary of Corrections or designee

2. Distribution to Staff

It is the responsibility of those individuals receiving policies and procedures, as indicated in the "General Distribution" section above, to ensure that each employee expected or required to perform the necessary procedures/duties is issued a copy of the policy and procedures.

SUPERSEDED POLICY AND CROSS REFERENCE

A. Superseded Policy

1. Department Policy

a. 6.5.1, Administration of Restricted Housing Units, issued July 20, 1993, by former Secretary Joseph D Lehman,
b. 6.5.1-1, Administration of Restricted Housing Units, issued August 1, 1995, by Secretary Martin F. Horn,
c. 6.5.1-2, Administration of Restricted Housing Units, issued October 2, 1995, by former Executive Deputy Secretary Raymond E. Clymer, Jr.,
d. 6.5.1-3, Administration of Restricted Housing Units, issued November 27, 1995, by Secretary Martin F. Horn,
e. 6.5.1-4, Administration of Restricted Housing Units, issued April 28, 1997, by Secretary Martin F. Horn,
f. 6.5.1-5, Administration of Restricted Housing Units, issued June 10, 1998, by Secretary Martin F. Horn,
g. 6.5.1-6, Administration of Restricted Housing Units, issued August 27, 1998, by Secretary Martin F. Horn,
h. 6.5.1-7, Administration of Restricted Housing Units, issued January 29, 1999, by Secretary Martin F. Horn,
i. 6.5.1-8, Administration of Restricted Housing Units, issued May 17, 1999, by Secretary Martin F. Horn,
j. 6.5.1-9, Administration of Restricted Housing Units, September 17, 1999, by Secretary Martin F. Horn,
k. 6.5.2, Staff Assignments to the Restricted Housing Units/Selection and Monitoring, issued November 7, 1983, by former Secretary Glen R. Jeffes,
l. 6.5.2-1, Staff Assignments to the Restricted Housing Units/Selection and Monitoring, issued January 12, 1999, by Secretary Martin F. Horn,

m 6 5 4, Use of Video Tapes for RHU/SMU Receptions, issued May 28, 1999, by Secretary Martin F. Horn,
n 6 5 7, Special Management Unit policy issued June 15, 1994 by former Secretary Joseph D. Lehman,
o 6 5.7-1, Special Management Unit bulletin issued February 17, 1998 by Secretary Martin F Horn,
p 6 5 7-2, Special Management Unit bulletin issued August 27, 1998 by Secretary Martin F Horn,
q 6 5 7-3, Special Management Unit bulletin issued February 5, 1999 by Secretary Martin F Horn,
r 6 5 7-4, Special Management Unit bulletin issued February 5, 1999 by Secretary Martin F Horn,
s 6 5 7-5, Special Management Unit May 17, 1999 issued by Secretary Martin F Horn,
t. 6.5.7-6, Special Management Unit September 17, 1999 issued by Secretary Martin F Horn

2. **Facility Policy and Procedures**

This document supersedes all facility policy and procedures on this subject.

B. Cross Reference(s)

1. **Administrative Manuals**

a. DC-ADM 007, Access to Provided Legal Services
b. DC-ADM 201,Use of Force and Restraints
c. DC-ADM 203, Searches of Inmates and Cells
d. DC-ADM 610, Food Services
e. DC-ADM 801, Inmate Discipline
f. DC-ADM 802, Administrative Custody Procedures
g. DC-ADM 803, Inmate Mail and Incoming Publications
h. DC-ADM 804, Consolidated Inmate Grievance Review System
i. DC-ADM 807, Inmate Hygiene and Grooming
j. DC-ADM 815, Commissary Privileges
k. DC-ADM 816, Inmate Compensation System
l. DC-ADM 818, Automated Inmate Telephone System
m DC-ADM 820, for Medical Services Co-Pay
n. 6.3.1, Facility Security
o. 6.3.12, Drug Interdiction
p. 6.6.2, Authorized Defensive Weapons and Equipment
q. 6.7.1, Emergency Preparedness
r. 7.2.1, Counseling Services
s. 7.3.1, Delivery of Mental Health Procedures
t. 11.7.1, Bed Management, Transfer Petition, and Transportation Systems
u. 13.1.4, Refusal to Eat and/or Take Liquids
v. 13.2.3, Access to Health Care
w. 13.4.1, Pharmacy Guidelines

C. ACA Standards

1. Administration of Correctional Agencies: N/A

2. Adult Correctional Institutions: 3-4128, 3-4129, 3-4131, 3-4132, 3-4133, 3-4134, 3-4136, 3-4139, 3-4144, 3-4145, 3-4146, 3-4244, 3-4245, 3-4246, 3-4247, 3-4248, 3-4250, 3-4251, 3-4252, 3-4253, 3-4254, 3-4256, 3-4257, 3-4261, 3-4301, 3-4319, 3-4321, 3-4325

3. Adult Community Residential Services: N/A

4. Adult Correctional Boot Camp Programs: N/A

5. Correctional Training Academies: N/A

PROCEDURES MANUAL
Commonwealth of Pennsylvania • Department of Corrections

Policy Subject:		Policy Number:
Administration of Security Level 5 Housing Units		6.5.1
Date of Issue:	**Authority:**	**Effective Date:**
June 8, 2000	Martin F. Horn	September 1, 2000

Release of Information

Policy Document: The Department of Corrections' policy document on this subject is public information and may be released to members of the public, staff, legislative, judicial, law enforcement and correctional agencies and/or inmates upon request.

Procedure Manual: This Procedure Manual is **not public information** and **shall not be released** in its entirety or in part, without the prior approval of the Secretary of Corrections or designee. This manual or parts thereof, may be released to any Department of Corrections employee on an as needed basis.

Procedure Development: All required procedures shall be developed in compliance with the standards set forth in this manual and/or the governing policy. These standards may be exceeded, but in all cases these standards are the minimum standard that shall be achieved. In the event a deviation or variance is required, a written request shall be submitted to the appropriate Regional Deputy Secretary and the Standards and Practices Unit for review and approval prior to implementation. Absent such approval, all procedures set forth in this manual shall be met.

6.5.1, Adm .istration of Security Level 5 Hou. .g Units
Procedure Manual
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ction 1 - Administration

Purpose

1 Restricted Housing Unit (RHU)

The primary purpose of an RHU is to securely house inmates who while in general population received disciplinary sanctions in accordance with Department policy **DC-ADM 801, "Inmate Discipline"** or who have been placed in Administrative Custody in accordance with **DC-ADM 802, "Administrative Custody Procedures."**

2 Special Management Unit (SMU)

The primary purpose of an SMU is to securely house inmates who exhibit behavior that is continually disruptive, violent, dangerous or a threat to the orderly operation of their assigned facility. Further, these inmates may have been repeatedly subject to disciplinary action or investigation(s). The unit is specifically designed to provide each inmate with the opportunity to demonstrate a stable level of behavior so they can be safely returned to general population or another suitable status.

3 Long Term Segregation Unit (LTSU)

The primary purpose of a LTSU is to securely house the extremely disruptive, violent and problematic inmates. Inmates placed in a LTSU shall have demonstrated an inability or unwillingness to conform to the requirements of general population. In addition, inmates who have continually manifested a negative influence on the safety and security of the PA Department of Corrections, have not suitably progressed in an SMU, or may have reportedly perpetuated criminal activity that threatens the community may be transferred to a LTSU. Each LTSU shall provide extremely high levels of security and sharply reduce the privileges permitted.

B. Physical Plant

1. General

Each Security Level 5 Unit shall be constructed or equipped with:

a maximum security constructed cells, furnished with a toilet, wash basin with hot/cold water, desk, stool, and bunk with a fire retardant, sanitizable mattress;[1]

b fixtures and furniture that are permanently fastened and constructed of high security grade materials;

c lockable cell door apertures;

d. lights and water controlled from outside the cell; and

3-4128, 3-4129, 3-4131, 3-4132, 3-4133, 3-4136

e appropriate devices to prevent inmates from throwing items at staff (i.e , screening, door shields, etc)

2 Recreation Areas

Each Security Level 5 Unit shall have individual exercise yards that meet the following specifications

a. Be constructed with 10' or 12' high 6 gauge chain link fencing,

b have a covered top of 9 gauge chain link fencing,

c have razor ribbon on the roof and yard fences;

d. have gates with lockable apertures through which inmates can be cuffing/uncuffed, and

e have gates that are of a sufficient security grade to contain maximum security inmates.

3. Storage Areas

Each Security Level 5 Unit shall provide adequate storage areas for

a inmate property;

b supplies, and

c. emergency equipment.

4. Shower Facilities

Each Security Level 5 Unit shower shall:

a. be lockable;

b. be equipped with a lockable aperture through which inmates can be cuffing/uncuffed,

c. have water and lights controlled from outside; and

d. have secure plumbing and lighting fixtures

8 Property Control

a The Unit Manager/Officer-in-Charge shall assign a Unit Officer as the Unit's Property Officer. This officer shall be responsible for inventory, control, securing, receiving, and issuing of all inmate property. An alternate may also be named. However, all Unit staff shall ensure that the property control procedures are followed.

b. When an inmate is placed in the L5 Unit, the receiving L5 Unit Officer or the Unit Property Officer shall inventory all personal property. All prohibited property shall be confiscated and marked with the inmate's name, number and housing unit he/she was received from, inventoried and a **DC-153, Personal Property Inventory** completed and the property stored in a designated area. The inmate shall be issued a copy of the **DC-153, Personal Property Inventory**. The **DC-154A, Confiscated Items Receipt** shall be properly completed and a copy issued to the inmate for all those items denied to him/her by the Corrections Officer conducting the inventory.

c. Each inmate shall receive the approved items for his/her status (basic issue, legal materials, etc.) from his/her property; he/she shall not be permitted access to his/her other property except for regulated legal materials or for items approved by PRC.

d While housed in the L5 Unit, inmates shall not be permitted to retain personal property, except as approved by the Unit Management Team or PRC and/or as provided in this manual

e The property shall be stored in the property room located within the unit, logged in the property log, properly labeled, and placed on appropriate shelving

f Upon being released back to general population, staff, in the presence of the inmate, shall remove and check the inmate's remaining property from storage and return it to the inmate. Any discrepancies or breakage shall be documented and forwarded to the appropriate staff The inmate shall sign the DC-153, **Personal Property Inventory** for all property received

g Property may be confiscated through misconduct procedures from any L5 Unit inmate who is abusing the property or fashioning it in such a way that it provides a threat to security or safety The decision shall be made by the Unit Manager/Officer-In-Charge and/or Shift Commander and reviewed by the Unit Management Team and PRC In addition, further disposition shall be made by the Hearing Examiner on the misconduct report

h Inmates housed in the L5 Unit may request a legal pack, (a reasonable amount of paper, carbon paper and a flex pen) for the purpose of preparing legal documents The Unit Manager/Officer-In-Charge shall permit the inmate to order the required items through the commissary If the inmate is indigent, the Unit Manager/Officer-In-Charge shall notify the Corrections Libranan who shall supply the necessary items The L5 Unit Lieutenant/Sergeant shall issue the inmate a security pen Upon issuance of the pen, it shall be logged on the DC-17X, **Adjustment Record For Security Level 5 Inmates**. During routine cell inspections and searches, the officers are to note the condition of the pen

E. Assignment of Inmates

1 RHU

Inmates shall be assigned to the RHU in accordance with Department policy, **DC-ADM 801, "Inmate Discipline" or DC-ADM 802, "Administrative Custody Procedures."**

2. SMU

1. Inmates assigned to an SMU are those who exhibit behavior that is continually disruptive, violent, dangerous or a threat to the orderly operation of their assigned facility. Further, these inmates may have been repeatedly subject to disciplinary action or investigations.

2 The following inmates shall generally be excluded from assignment to an SMU:

(1) protection/self-confinement cases,

(2) inmates with a major psychiatric disorder (Axis I), excluding drug and/or alcohol diagnoses,

(3) inmates whose behavior has been, or is, a risk of escape or a threat to others or the facility as a whole, and that placement in general population or RHU would not currently be appropriate

(4) developmentally disabled inmates; and

(5) physically disabled inmates

3. LTSU

a Any inmate who is, has, or may be planning to engage in the following activities may be appropriate for assignment in the LTSU.

(1) inmates who fail to complete SMU,

(2) serious escape history;

(3) assaultive behavior with the intent to cause death or serious bodily injury;

(4) injury to staff and/or inmates,

(5) engaging in facility disturbance(s);

(6) recorded history of having or exerting negative influence in facility activities,

(7) Security Threat Group (STG) member, or other unauthorized organization(s);

(8) Perpetuated criminal activity that threatens the community;

(9) a history of being a sexual predator; and/or

(10) possessing weapons and/or implements of escape

b. The authority to request an inmate's classification as a CL 5H rests with the Facility Manager of the referring facility

c. The authority to approve or disapprove classification as a CL 5H shall rest with the Executive Deputy Secretary or designee. This shall include the authority to verbally approve a placement under extenuating or emergency circumstances. The submission of an automated transfer request and a completed referral packet shall still be required.

d. Upon final approval of the classification, coordination of the actual placement shall be the responsibility of the Diagnostic Classification Coordinator's office.

1. RHU

   All inmates confined in the RHU shall be handled in accordance with DC-ADM 801, "Inmate Discipline" and DC-ADM 802, Administrative Custody Procedures."

2. SMU

   SMU shall be given the opportunity to progress through specific phases within the SMU based upon their behavior and ability to adjust under reduced levels of supervision. Each phase shall offer progressively more privileges and services. Movement between phases is based upon the inmate meeting certain criteria. Inmates received in Disciplinary Custody shall begin at Phase 5; inmates received in Administrative Custody shall begin at Phase 4. **Attachment A** provides an overview of the privileges associated with each Phase.

a Phase 5

This phase is the starting point for inmates in disciplinary custody Inmates shall stay in this phase until the expiration of their DC time or until the PRC grants them an early release from DC status. In-cell educational programs may be approved by PRC

b Phase 4

This phase is the starting point for all inmates transferred to the SMU in AC status and inmates in Phase 5 who have completed their DC time These inmates shall receive the privileges and services established by Department policy **DC-ADM 802, "Administrative Custody Procedures."** In-cell educational and activities programs may be approved by the PRC

c. Phase 3

Inmates progress to this phase from Phase 4 as set forth in **Section I.2** below. Inmates in this phase remain in AC status, but are eligible for privileges and services in addition to those established in **DC-ADM 802, Administrative Custody Procedures."** In this phase, in-cell programming shall be increased to allow the inmate supervised cell study programs from the Education and Activities Departments

d Phase 2

Inmates in this phase also remain in AC status. This is the first time that inmates are permitted out of their cells without restraints individually or in small groups no greater than four (4) inmates. This shall include group counseling, small group yard activities, educational classes, and block out As inmates progress in this phase, they may be assigned as block workers or janitors The number of staff needed to provide proper control and supervision of the group shall be determined by the Unit Management Team.

e. Phase 1

Phase 1 is a probationary period in general population in the inmate's designated facility This probationary period shall last at least 90 days and may be extended to as long as 180 days by Unit Management Team using the inmate staffing review process All inmates on SMU Phase 1 probation shall retain "Z" and "O" program codes. These program codes may be removed by unit management team staffing only after completion of the probationary period.

3. LTSU

Inmates in the LTSU may be changed from one level to another as follows.

a. Inmates in all levels shall be personally reviewed every 30 days by the LTSU Management Team in order to monitor progress and to evaluate any potential for advancement to the next. The Unit Management Team shall develop a new **DC-43, Prescriptive Program Plan** at that time level.

b. The following factors shall be considered prior to advancement to the next level:

(1) time in level,

(2) continued facility risk,

(3) number, type, and frequency of misconducts,

(4) involvement in self-improvement activities,

(5) unit behavior and housing reports, to include:

(b) quarters sanitation;

(c) personal hygiene and grooming,

(d) response to verbal and written orders,

(e) response to authority,

(f) interaction with other inmates,

(g) completion of specific goals as set by Unit Management Team,

(h) work performance, and

(i) demeanor with staff on the block and at periodic reviews

b. RHU

All mail for inmates in the RHU shall be in accordance with Department policy **DC-ADM 803, "Inmate Mail and Incoming Publications."**

c SMU

(1) Receipt of mail shall be based on each inmate's phase, and is considered to be a privilege

(a) Phase 5 - legal, personal, ten (10) photographs, and one (1) newspaper (each newspaper shall be issued as a one (1) for one (1) exchange)

(b) Phase 4 - legal, personal, ten (10) photographs, one (1) magazine, and one (1) newspaper (each newspaper shall be issued as a one (1) for one (1) exchange)

(c) Phase 3 - legal, personal, ten (10) photographs, ten (10) magazines, and one (1) newspaper (each newspaper shall be issued as a one (1) for one (1) exchange)

(d) Phase 2 – same as Phase 3

(e) Phase 1- same mail privileges as general population

(2) The Unit Management Team may authorize additional mail privileges, as part of the inmate's DC-43, "Prescriptive Program Plan," as reinforcement for the inmate's completion of specific goals within specified timeframes

d LTSU

(1) Receipt of mail shall be based on each inmate's phase, and is considered to be a privilege

(a) Level 2 – Legal/personal correspondence

(b) Level 1 Legal/personal correspondence, one (1) newspaper and five (5) magazines. Each newspaper shall be issued as a one (1) for one (1) exchange

. Special Services

1 Telephone Privileges

a RHU

Inmates shall be permitted telephone calls in accordance with Department policy DC-ADM 801, "Inmate Discipline" and DC-ADM 802, "Administrative Custody Procedures."

b SMU

(1) While confined in the SMU, inmates are permitted emergency telephone calls only until progressing to Phase 3

(2) Inmates in Phase 3 may be permitted one (1) telephone call per month Inmates in Phase 2 may be permitted one (1) telephone call every two (2) weeks (or two [2] in a month)

(3) The Unit Management Team may authorize additional telephone privileges, as part of the inmate's Prescriptive Program Plan, as reinforcement for the inmate's completion of specific goals within specified timeframes

(4) The Unit Manager shall deal with emergency telephone calls on a case-by-case basis All situations that may warrant an emergency call shall be verified.

(5) In the event of a request for an emergency telephone call when the Unit Manager is not available, an emergency call for a serious illness or death of a family member may be authorized by the Facility Manager, Deputy Superintendents, PRC, Major, or the Shift Commander.

(6) All telephone calls shall be limited to fifteen (15) minutes in duration and shall be made collect from the inmate telephone in the unit pursuant to Department policy DC-ADM 818, "Automated Inmate Telephone System."

2. Basic Issue, Hygiene Items, and Commissary

a Inmates confined in a L5 Unit shall be issued the following items:

1 jumpsuit	1 copy of the unit handbook
1 blanket	1 flex-toothbrush
3 pairs of socks	1 toothpaste
3 undershorts (males)	1 washcloth
3 panties (females)	1 toilet paper

3 undershirts (males and females)	writing paper**
3 bras (females)	carbon paper**
2 sheets	up to 10 postage paid envelopes
1 pillowcase	1 request slip**
1 pair slip on canvas shoes	1 flex-pen**
1 bar of soap	1 comb**
1 grievance form**	

b Special items falling in the category of personal hygiene such as denture items, prescription eyeglasses, combs, feminine hygiene products, etc shall generally be permitted unless a security concern is evident Any such request shall be addressed to the Unit Manager/Officer-In-Charge for review.

c Accumulation of the article listed above may be restricted when it affects security, health, sanitation, or safety No articles or items are permitted that are composed entirely or in part of glass or metal, this includes lids as well as containers. Items that are not on the above list shall be approved by the Unit Manager before they shall be permitted in the inmate's possession

3 Commissary

a. General

(1) When permitted, all commissary purchases shall be consistent with **DC-ADM 801, "Inmate Discipline," DC-ADM 802, "Administrative Custody Procedure, and DC-ADM 815, "Commissary Privileges."**

(2) Each facility shall develop a separate commissary list (order form) for inmates in L 5 status

(3) DC status inmate purchases shall be limited to approved commissary items for personal hygiene (excluding razors), underwear, items needed for personal/legal correspondence (excluding pens/pencils). All tobacco products are prohibited.

(4) AC status inmate purchases shall be limited to items that have not been identified as safety/security items by the Deputy Superintendent for Facilities Management/Deputy Superintendent for Internal Security.

(5) If possible and practical, the facility shall provide an alternate item, or an appropriate procedure as a substitute for restricted items. For example, a "flex-pen" may be issued instead of a pen/pencil.

(6) Officers shall not pass commissary items from one inmate to another.

(7) Inmates are not permitted to retain any of the paper/plastic bags used to transport commissary

b RHU

Commissary privileges for RHU inmates shall be in compliance with the general procedures listed above.

c SMU

Commissary privileges for the SMU inmates shall be in compliance with the general procedures listed above and

(1) Phase 2 inmates are permitted to purchase a radio and/or television. Phase 3 inmates are permitted to purchase a radio only, upon approval of the Unit Manager. Earphones are required for both televisions and radios

(2) The following additional articles are permitted for Phases 2 and 3:

greeting cards	newspaper (not over one week old)
legal envelopes	magazines (no more then 10),
loose leaf paper	hard or soft back dictionary
notebook (composition type, no metal)	wedding band
Writing tablet	legal and religious materials that fit in
edible commissary	one (1) records center box

(3) Phase 2 inmates are permitted to purchase up to $20.00 of commissary items per week. Phase 3 inmates are permitted to purchase up to $10.00 of commissary items per week. Neither Phase 2 or Phase 3 inmates may purchase articles of clothing. Commissary privileges may be revoked by the Unit Management Team or PRC if abused by the inmate

(4) The Unit Management Team may authorize additional personal property/commissary privileges, as part of the inmate's **DC-43, Prescriptive Program Plan** as reinforcement for the inmate's completion of specific goals within specified timeframes.

d LTSU

Commissary privileges for the LTSU inmates shall be in compliance with the general procedures listed in **Section a** above and shall be limited to five dollars ($5.00) per week.

4 Barber/Cosmetology Services

a All inmates are required to maintain grooming standards in accordance with Department policy **DC-ADM 807, "Inmate Hygiene and Grooming."**

b. All inmates shall be eligible for a haircut once each 30 days or as provided for inmates in general population. A haircut may be provided prior to the first 30 days being served if necessary, to ensure that the inmate is in compliance with the **DC-ADM 807,**

(3) Use of the mini law library may be denied if there is an immediate security concern

(4) The Unit Manager/Officer-In-Charge or designee shall maintain a log to record inmate use of the library, including name, number, date, and length of time the library was used

(5) The facility librarian shall inventory and update the unit's mini law library on a weekly basis

(6) An inmate shall only be permitted to assist or be assisted by other inmates as approved by the Unit Manager/Officer-In-Charge or designee

(7) the inmate and all reference materials shall be searched before going to and upon leaving the library.

8 Visits

a Frequency

(1) RHU

The frequency of visits for each RHU inmate shall be determined by his/her custody status

(a) DC status inmates shall be permitted one (1) visit per month with immediate family.

(b) AC status inmates shall be permitted one (1) visit per week with immediate family.

(c) RHU visits shall be permitted Monday through Friday No weekend, holiday, or extended visiting hours are permitted

(d) All visits are restricted to a maximum of one (1) hour.

(2) SMU

The frequency of visits for each SMU inmate shall be determined by his/her management Phase.

(a) SMU Phase 5 - non-contact, one (1) per month, immediate family only.

(b) SMU Phase 4 - non-contact, one (1) per week, and a maximum of 2 weekend or holiday visits per month

(c) SMU Phase 3 - non-contact, one (1) per week, and a maximum of 2 weekend or holiday visits per month.

(d) SMU Phase 2 - non-contact, one (1) per week, and a maximum of 3 weekend or holiday visits per month

(e) SMU Phase 1 - non-contact, same number of visits as general population.

(f) The Unit Management Team may authorize additional visiting privileges, as part of the inmate's DC-43, **Prescriptive Program Plan** as reinforcement for the inmate's completion of specific goals within specified timeframes.

(g) All visits shall be a minimum of one (1) hour.

(3) LTSU

The frequency of visits for each LTSU inmate shall be determined by his/her management Level.

(a) LTSU Level 2 - One (1) non-contact weekday visit (of at least one (1) hour) is permitted per month with immediate family only. No holiday visits are permitted.

(b) Level 1 - Two (2) non-contact weekday visits (of at least one (1) hour) per month with any approved visitor is approved.

(c) The Unit Management Team may authorize additional visiting privileges, as part of the inmate's DC-43, **Prescriptive Program Plan** as reinforcement for the inmate's completion of specific goals within specified timeframes.

General Procedures

(1) All L 5 visits shall be non-contact and under direct/constant visual observation of a Corrections Officer.

(2) All L 5 visits shall be conducted in the unit, if a visiting area is available, or in another location with securable a non-contact area(s).

(3) The number of visitors permitted at any given time is limited to 2. This may be two (2) adults or one (1) adult and one (1) child under the age of eighteen (18.) The Unit Manager and/or Shift Commander has the discretion to permit additional visitors such as small children and/or infants on a case-by-case basis.

(4) All L 5 inmates, regardless of Custody status, Phase or Level, may receive non-contact visits from legal counsel. Legal visits shall not be limited in number or frequency absent security concerns, and then only upon the Facility Manager's approval following consultation with the Department's Office of Chief Counsel.

(5) The inmate shall be escorted to and from visits by unit Officers or Corrections Officers assigned by the Shift Commander/designee.

(6) Failure to comply with all rules and regulations during visits by the inmate or his/her visitor(s) shall result in the termination of the visit

(7) Personal items, such as handbags are not permitted, nor is smoking permitted by the inmate or the visitor in the visiting area No food items are permitted

(8) Appropriate restraints shall remain on the inmate while the inmate is in the visiting area

(9) The visit shall be kept under constant observation by the assigned Officer.

(10) All visitors are required to present identification and are subject to the use of hand held metal detectors, electronic drug detection devices, etc in accordance with Department policy **DC-ADM 812 "Inmate Visiting Privileges."**

(11) Visitors who fail to act in compliance with visiting privilege guidelines shall have the visit terminated.

(12) Visits shall be limited on a first come, first served basis.

(13) When notified of a visit, the unit Officer shall inform the inmate, allow him/her time to prepare for the visit. The Escorting Officer shall ensure that the inmate is properly dressed and restrained.

(14) Once in the visiting area, the inmate shall be transferred to the custody of the Visiting Officer(s) until the visit is concluded Once the visit is concluded, the Visiting Officer shall notify the Unit Control Booth and the inmate shall be returned to the cell.

9. Religious Privileges

a The facility's Chaplains are responsible for tending to each inmate's religious needs, provided that such services do not infringe upon the security precautions of the unit. The Chaplaincy Department may provide religious items to the inmates with the approval of the Unit Manager/Officer-In-Charge and in accordance with Department policy **DC-ADM 819, "Religious Activities."**

b Inmates confined in a L5 Unit are not permitted to attend religious services in the Chapel. Inmates in a L5 Unit shall be visited by a Facility Chaplain on a daily basis, when available, and weekly by a Chaplain of the inmate's faith, if available. All Chaplains entering/exiting the unit shall sign in/out in the **DC-702, Security Level 5 Housing Unit Visitors Log.** Entries shall also be made by unit staff in the log book and daily report documenting the visit.

c. Each inmate shall be permitted to retain religious materials, that along with any legal materials, shall fit in the one (1) records center box. Approved religious materials are any written documents that are reasonably related to religion. Any questions

	RHU	SMU	LTSU
Activities	In Cell	Phase 5, 4 and 3-In Cell Phase 2 in Small Groups	← Same as RHU →
Commissary	DC Status – Toilet Articles AC-Status- In accordance with AC Commissary List **No Tobacco products permitted.**	Phases 5 and 4-Writing Materials Only Phase 3 -$10 per week (no clothing) Phase 2 -$20 per week (no clothing) **No Tobacco products permitted.**	Level 2 - None Level 1-$5 per week **No Tobacco products permitted**
Compensation	As per DC-ADM 816, Inmate Compensation System	← Same as RHU	← Same as RHU
Counseling Services	In Cell Visits by Counselor	Phases 5, 4 and 3-In Cell Visits by Counselor Phase 2 / Small Group in Unit	← Same as RHU
Educational Services	Both Status-In cell as approved by PRC	All Phases –In cell as approved by Unit Team Phase 2-Small Group in Unit	Level 2-In cell study (GED and Special Ed, if approved) Level 1-None
Employment	DC Status-Unit Janitor (if no AC available) AC Status-Unit Janitor	Phases 5 and 4 -None Phase 3-Unit Janitor (if no phase 2 available) Phase 2-Unit Janitor	Level 2-Unit Janitor (if no Level 1 available) Level 1-Unit Janitor
Exercise	1 Hour – 5 Days a Week	← Same as RHU	← Same as RHU
Laundry	Twice per week	← Same as RHU	← Same as RHU
Legal-Religious Materials	Contents of 1 Records Center Box	← Same as RHU	← Same as RHU
Library Services	Recreational books from library. Mini law library on unit.	← Same as RHU	← Same as RHU
Mail-Incoming Publications	Legal/Personal Correspondence as per DC-ADM 803, Inmate Mail and Incoming Publications	Phase 5- 1 Newspaper, 10 Photos Phase 4- 1 Newspaper, 10 Photos, 1 Magazine Phase 3- 1 Newspaper, 10 Photos, 10 Magazines Phase 2- Same as Phase 3	Level 2- Legal/Personal Correspondence Level 1- Legal/Personal Correspondence, 1 Newspaper, 5 Magazines
Medical-Dental	In Unit Screening	← Same as RHU	← Same as RHU
Mental Health	In Unit Screening	← Same as RHU	← Same as RHU
Property	AC/DC Status -Toilet Articles, Shower Shoes, Eyeglasses, Dentures	All Phases - Shower Shoes, Dictionary, Eyeglasses, Dentures	Both Levels-Shower Shoes, Dictionary, Eyeglasses, Dentures
Radio-Television	DC Status – None AC Status- As approved by PRC	Phases 5 and 4-None Phase 3-Radio only Phase 2-Radio and Television	Level 2-None Level 1-None
Religious Activities	In Cell Visits by Chaplain	← Same as RHU	← Same as RHU
Showers	Three (3) per week	← Same as RHU	← Same as RHU
Telephone Calls	DC Status As per DC-ADM 801, Inmate Discipline AC Status As per DC-ADM 802, Administrative Custody Procedures	Phase 5-and 4-Emergency Only Phase 3-One per month Phase 2-One every 2 weeks	Level 2- Emergency Only Level 1-1 per month
Visits All Non-Contact	DC Status-1/month immediate family AC Status-1/week	Phase 5-1/month immediate family Phases 4 & 3- 1/week and 2 weekend/holiday a month Phase 2-1/week and 3 weekend/holiday a month	Level 2-1 per month immediate family Level 1-2 per month immediate family

POLICY STATEMENT
Commonwealth of Pennsylvania• Department of Corrections

Policy Subject: Capital Case Administration		Policy Number: 6.5.8
Date of Issue: July 30, 1997	Authority:	Effective Date: July 30, 1997

I. AUTHORITY

The Authority of the Commissioner of Corrections to direct the operations of the Department of Corrections is established by Sections 201, 206, 506, and 901-B of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, No. 175, as amended.

II. PURPOSE

The purpose of this directive is to set forth policy and procedures for:

A. Standardizing the administration of Capital Case status inmates;
B. Delivering of an appropriate array of program opportunities for Phase I Capital Case inmates;
C. Providing for access to legal materials by Capital Case inmates;
D. Standardizing the duties and responsibilities for those staff assigned to the care and custody of Capital Case status inmates;
E. Designating the number and qualifications of personnel who will carry out executions;
F. Handling news media coverage of executions; and
G. Providing the opportunity for the interaction between registered victim and the Office of the Victim Advocate

III. APPLICABILITY

This policy is applicable to all persons employed by the Department of Corrections and to those individuals and groups who have business or use the resources of the Department.

DEFINITIONS:

The definitions of terms pertaining to this policy are included in the Capital Case Manual.

POLICY

It is the policy of the Department of Corrections to:

A. Administer all Capital Cases in a secure and humane manner consistent with applicable law;
B. Ensure that all Phase I Capital Case inmates are governed by the same general policies applicable to all Administrative Custody inmates with the few exceptions described in specific policies;
C. Ensure that all Phase I Capital Case inmates in Administrative Custody status have access to educational and leisure programs;
D. Make appropriate provisions allowing Capital Case inmates in Phase I and/or Phase II access to legal materials;
E. Provide a safe, secure and humane process of administering a Capital Punishment sentence as required by applicable laws and statutes of the Commonwealth of Pennsylvania;
F. Make reasonable accommodations for and respond appropriately to the needs of the representatives of the various news media in their coverage immediately before, during and after an execution, while preserving the good order and security of the institution; and
G. Provide for appropriate accommodations for preparing registered victims who have chosen to serve as a witness of an execution.
H. Ensure the appropraite dissemination of records and information relating to capital case inmates.

PROCEDURES

All pertinent procedures regarding this policy are included in the Capital Case Manual.

The policies developed under the authority of this document are public information. The attached manual is confidential, is <u>not</u> public information and is not subject to any disclosure requirements otherwise governing the contents of the Department's Administrative Manuals.

VII. SUSPENSION DURING EMERGENCY

In an emergency situation or extended disruption of normal institutional operations, any provision or section of this policy may be suspended by the Commissioner or his/her designee.

RIGHTS UNDER THE POLICY

This policy does not create rights in any person nor should it be interpreted or applied in such a manner as to abridge the rights of any individual. This policy should be interpreted to have sufficient flexibility so as to be consistent with law and to permit the accomplishment of the purposes of the policies of the Department of Corrections.

SUPERSEDED POLICY AND CROSS REFERENCE

A. This policy supersedes the following policies:

Volume I, 1.4.2, News Media Coverage of Executions, issued on 9-28-92, by former Commissioner Joseph D. Lehman
Volume VI, 6.3.9, Solitary Confinement Officer, issued on 9-28-92, by former Commissioner Joseph D. Lehman.
Volume VI, 6.3.9 -1, Solitary Confinement Officer, issued on 9-5-95, by Commissioner Martin F. Horn.
Volume VI, 6.5.4, Legal Materials, Access for Capital Cases, issued on 9-28-92, by former Commissioner Joseph D. Lehman.
Volume VI, 6.5.8, Capital Cases, issued on 9-28-92, by former Commissioner Joseph D. Lehman.
Volume VI, 6.5.8 -T, Capital Cases, issued on 1-10-96, by former Executive Deputy Commissioner Raymond E. Clymer, Jr.
Volume VI, 6.5.8 -2, Capital Cases, issued on 9-5-95, by Commissioner Martin F. Horn.
Volume VI, 6.5.8 -3, Capital Cases, issued on 9-13-96, by former Executive Deputy Commissioner Raymond E. Clymer, Jr.
Volume VI, 6.5.9, Programs for Phase I Capital Cases, issued on 9-28-92, by former Commissioner Joseph D. Lehman.
Volume VI, 6.5.10, Capital Cases Management Plan Policy (pilot Project), 9-28-92, by former Commissioner Joseph D. Lehman.
Volume VI, 6.5.12, Phase III Capital Case Administration, issued on 5-1-95, by Commissioner Martin F. Horn.
Volume VI, 6.5.12 -1, Phase III Capital Case Administration, issued on 9-5-95, by Commissioner Martin F. Horn.
Volume VI, 6.5.12 -2, Phase III Capital Case Administration, issued on 9-13-96, by former Executive Deputy Commissioner Raymond E. Clymer, Jr.
Volume XVI, 16.2.5, Injection Team, issued on 3-28-91, by former Commissioner Joseph D. Lehman.

B. Administrative Manuals Cross Reference(s):
DC-ADM 009, News Media Relations
DC-ADM 801, Inmate Disciplinary and Restricted Housing Procedures
DC-ADM 802, Administrative Custody Procedures
DC-ADM 806, Inmate Deaths
DC-ADM 812, Visiting Privileges
DC-ADM 815, Commissary Privileges
DC-ADM 816, Inmate Compensation System
DC-ADM 818, Inmate Telephone Calls
1.4.1, 1.4.1-1, 1.4.1-2 News Media Relations

C. ACA Cross Reference(s): None

CAPITAL CASE
MANUAL
6.5.8

CONFIDENTIAL

Last Revised on: July 24, 1997

Distribution Restricted to:

Commissioner of Corrections
Executive Deputy Commissioner
Regional Deputy Commissioners (3)
Superintendent, Capital Institution
Deputy Superintendents, Capital Institution (2)
Superintendent, Home Institution
Deputy Superintendents, Home Institution (2)
Director, Office of Professional Responsibility
Chief of Security
Chief Counsel
General Counsel
Press Secretary

Approved by:

Commissioner

Date 7/24/97

Definitions:

A. **Administrative Custody** - A status of confinement for non-disciplinary reasons which provides closer supervision, control, and protection than is provided for in general population.

B. **Attorney of Record** - The person appointed by the court or designated by the inmate as legal counsel to the inmate at the time of the scheduled execution.

C. **Capital Case** - An inmate (1) physically committed to the Department of Corrections under a sentence of Capital Punishment; (2) pending sentencing under a jury recommendation for Capital Punishment; or (3) whose sentence of Capital Punishment has been vacated, but is awaiting re-sentencing where a sentence of Capital Punishment may be reimposed.

D. Visiting

1. All visits for inmates in Phase I shall be non-contact unless otherwise directed by court order or approved by the Commissioner of Corrections or designee.

2. Each inmate will be allowed one (1) visit per week.

3. The duration of a visit shall be a minimum of one (1) hour and a maximum of two (2) hours.

4. Legal and Spiritual Advisor visits are not counted, however they are to be non-contact.

5. Special requests for a contact visit by an Attorney for testing, etc., must be forwarded to the Office of Chief Counsel for review. The respective Regional Deputy Commissioner shall approve/disapprove all contact visit requests.

6. Attorney/Client confidentiality privileges are to be maintained and each inmate must be afforded the opportunity to have confidential conversations with the Attorney of record.

7. Additional and/or extended visits may be approved by the Superintendent or designee as per the DC-ADM 812, Visiting Privileges policy.

E. Telephone Calls

1. Each inmate is to be afforded the opportunity to place one (1) collect, fifteen (15) minute telephone call per week.

2. In addition, collect telephone calls to the Attorney of record will be permitted upon request by the Attorney, but restrictions may be imposed if abuse of the privilege occurs.

3. Telephone calls to an Attorney will be handled in accordance with the DC-ADM 818, Inmate Telephone Calls policy.

F. Television and Radio

Personal television and radio may be permitted in accordance with the DC-ADM 802 Administrative Custody Procedures policy.

G. Exercise

1. Phase I Capital Case inmates shall be permitted one (1) hour of outdoor exercise five (5) days per week, weather permitting.

2. Up to two (2) inmates may be permitted to exercise together in an outside exercise area, taking into account separation and security concerns, for one (1) hour per day, five (5) days per week.

3. A handball and/or basketball is permitted.

Cell Property

1. One (1) record center size box is permitted.

2. An arm chair or desk type piece of furniture is also permitted provided it is of a material that does not pose a security threat.

3. Inmates of the Muslim faith are permitted One (1) prayer rug, however it must be rolled up when not in use.

4. Commissary items, such as lotions, creams, etc., are permitted, but the items may not be retained by the inmate.

Available Programs

Educational and leisure programs shall be made available to interested Phase I Capital Case inmates housed in Administrative Custody.

1. **Educational Programs**

   a. Educational programs shall range from basic literacy through high school.

   b. The programs will be at no cost to the inmate.

   c. Post-secondary opportunities may be made available at the inmate's expense.

   d. Other educational programs available are:

      (1) Adult Basic Education (ABE)
      (2) General Equivalency Diploma (GED)
      (3) Individual/Self Study Program

   e. In-Cell Work Programs may be considered. If developed and approved, appropriate pay in accordance with the DC-ADM 816, Inmate Compensation System policy, should be afforded.

2. **Education Director**

The Education Director will assure that:

a. All Phase I Capital Case inmates are made aware of educational opportunities available, and are advised of the procedures for requesting participation.

b. The standard materials are available and are provided as needed. (S)he will also assure that appropriate tutoring is provided as needed by the particular program.

c. Only materials deemed appropriate for each level are used.

3. **Leisure Activities**

The Activities Manager will assure:

a. That Phase I Capital Case inmates are aware of recreational opportunities and are advised of procedures for requesting participation.

b. Only selected and approved arts and crafts materials, authorized by the Superintendent are used.

4. **Religious Activities**

As permitted in accordance with the DC-ADM 802 Administrative Custody Procedures policy.

5. **Reading Materials**

a. Library materials may be made available through established procedures.

b. Inmates will be allowed to retain legal, religious, educational, recreational reading materials (books and magazines) and other legal documents that can be stored in the one (1) record size box permitted.

c. Newspapers will be permitted on a one (1) for one (1) exchange basis.

J. **Inmate Transfers**

If a Phase I Capital Case inmate participating in a program is transferred, progress records and the materials being used will be transferred with the inmate to assure continuity of participation at the next institution.

K. **Placement in Disciplinary Custody Status**

A Phase I Capital Case inmate transferred to Disciplinary Custody Status will be suspended from program participation until returned to Administrative Custody in accordance with the DC-ADM 802 Administrative Custody Procedures policy.

L. **Capital Case Inmate Transfer to Mental Health Unit or SCI - Waymart Forensic Unit**

The procedures contained in this manual are applicable to all capital case inmates transferred to a mental health unit or to the SCI - Waymary Forensic Unit. Any variation from these policies for the purpose of engaging the inmate in more treatment programs or variance for any other reasons must be requested in writing to the Department's Chief of Psychiatry in the Bureau of Health Care Services. The Chief of Psychiatry in consultation with the appropriate Regional Deputy Commissioner and the Commissioner shall make a decision as to whether to deviate from policy.

POLICY STATEMENT
Commonwealth of Pennsylvania • Department of Corrections

Policy Subject:		Policy Number:
Inmate Mail and Incoming Publications		DC-ADM 803
Date of Issue:	**Authority:**	**Effective Date:**
January 22, 2001	Martin F. Horn	February 19, 2001

I. AUTHORITY

The Authority of the Secretary of Corrections to direct the operation of the Department of Corrections is established by Sections 201, 206, 506, and 901-B of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, No. 175, as amended.

II. PURPOSE

It is the purpose of the Department of Corrections to establish policy and procedures that govern inmate mail privileges and incoming publications.[1]

III. APPLICABILITY

This policy applies to all inmates and employees, volunteers, and contract vendors who reside or work in facilities under the jurisdiction of the Department with the exception of the Bureau of Community Corrections.

IV. DEFINITIONS

A. Approved Inmate Name

The committed name and/or a name change that is in accordance with Department policy, **11.5.1, "Records Office Operations."**

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[1] 1-ABC-5D-01, 1-ABC-5D-04; 2-CO-5D-01

F. Incoming Publications

1. General Procedures

a. All publications must be received from the original source. Covers of hardbound publications may be damaged through examination or removed where inspection of the cover is deemed necessary and no reasonably available alternative form of inspection is adequate.

b. Magazines must be mailed directly from the original source. Small letter sized pamphlets may be received in regular correspondence from family members, friends or religious advisors.

c. Newspapers may be mailed or delivered to the facility.

d. Publications that are sent directly from a publisher, bookstore, book club, distributor or department store will usually be deemed to have come from the original source.

e. Newsletters and other mail from recognized non-profit religious and charitable organizations, when addressed to an individual inmate shall be delivered to the inmate even if mailed at less than first or second-class mail rates (i.e., bulk mail rate).

f. If a publication contains questionable content, mailroom personnel, education staff, or the librarian will be responsible for forwarding these publications to the Incoming Publication Review Committee (IPRC).

g. An inmate may receive more than one copy of any publication only with special approval of the IPRC.

h. Upon transfer, publications approved at one facility will not necessarily be permitted in another facility. The IPRC at the receiving facility will review any publications that are deemed questionable.

i. Upon receipt of mail sent at less than First or Second Class Rate, the mail inspector will verify that the stamp specifically states "Bulk Rate" and if the words "Bulk Rate" are not printed on the mail, it will be processed as incoming mail.

j. However, if the words "Bulk Rate" are marked on the item, the mail inspector will determine if the item meets the criteria for a publication as outlined in section, IV-P. If the criteria for a publication are met, it will be accepted and processed in accordance with section, IV-F <u>regardless of the postal rate at which it was mailed.</u> Although, if the item has a Bulk Rate Stamp, but does not meet the criteria for a publication, delivery will be refused in accordance with section, VI (E)(9).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD BANKS,
Plaintiff,
vs
JEFFREY BEARD,
Defendant

The deposition of JOEL DICKSON was taken pursuant to the Federal Rules of Civil Procedure, before Sarah A. Hornak, Court Reporter and Notary Public in and for the Commonwealth of Pennsylvania at the State Correctional Institution at Pittsburgh, 3001 Beaver Avenue, Pittsburgh, Pennsylvania 15233, on the 2nd day of August 2002, beginning at 10:15 a.m.

COPY

Sarah A. Hornak
Court Reporter
153 Mary Meringolo Street
Mcdonald, Pennsylvania 15320
(412) 667-0479

I N D E X

WITNESS EXAMINATION BY PAGE
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E X H I B I T S

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6 - Letter requesting "CRATTERstamps" 77
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13 - SCI Library Book Request Slip 83
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23 - Annual Renewal List 100

A P P E A R A N C E S

On behalf of the Plaintiff:

JESS KRAKOFF, Esquire
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On behalf of the Defendant:

MICHAEL ALEXANDER HERTZEL, Esquire
Deputy Attorney General
Litigation Section
Manor Complex, 4th Floor
Pittsburgh, Pennsylvania 15219

P R O C E E D I N G S

JOEL DICKSON,
a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. KRAKOFF
Q What is your name?
A Joel Scott Dickson.
Q Are you a deputy superintendent at the State Correctional Institution at Pittsburgh?
A I am.
Q What is your title?
A I'm the deputy superintendent for centralized services
Q What does that job entail?
A Generally, I have oversight of the treatment side of the institution; the hospital care, dietary, treatment services to include— drug and alcohol, the psychology department. Correctional industries falls under my purview. That pretty much covers the big ones.
Q You supervise those areas?
A I do.
Q Did you hold any other positions at

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SCI Pittsburgh prior to that?
A. Yes, I did. I previously was the deputy superintendent for internal security.
Q. When did you hold that position?
A. From my hiring here in July of 1998 through March of this year.
Q. March of 2002?
A. Correct.
Q. Was it in March that you assumed the other centralized services position?
A. Yes.
Q. Will you summarize what your responsibilities were when you were deputy superintendent for internal security?
A. Primarily, I supervised all the functions of the security office, which would include all internal investigations in the institution.
Also, I was responsible for control and access control to the institution and out of the institution trying to ensure that contraband did not enter the institution through the visiting room, the mailroom, things like that.
I also had oversight of the RHU, the Restricted Housing Unit, which includes the

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LTSU, the Long Term Segregation Unit.
Q. What were your responsibilities in conjunction with the Long Term Segregation Unit?
A. I had, again, direct supervision. I worked directly for the superintendent. I played a significant role in the development of the Long Term Segregation Unit here at Pittsburgh and directly supervised the staff in the LTSU.
Q. Did you play any role in the development of policies as they related to the access of Long Term Segregation Unit inmates to newspapers or other reading materials?
A. Primarily, we would enforce those policies and procedures that were formulated at our central office.
Q. And that is the same, I suppose, with respect to access of inmates in the Long Term Segregation Unit to photographs?
A. Yes.
Q. Do you know who within the central office developed the Long Term Segregation Unit policies?
A. Policies and procedures come out of the office of standards and practices. Who

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specifically played a role, generally these are done through a committee process. Who participated in that, I couldn't say.
Q. Are there permanent members who would sit on the committee process, or would that vary?
A. I honestly don't know.
Q. But you're, I suppose, intimately familiar with the policies that apply in the Long Term Segregation Unit to access to reading materials as well as access to photographs?
A. I can generally speak to those issues. Yes.
Q. In your current capacity of centralized services, I take it that you don't have any responsibilities in conjunction with maintaining security in the LTSU, is that right --
A. That's correct.
Q. But the other --
A. That's correct.
Q. I'll complete my sentence, because I didn't. The other superintendent has responsibility over that area?
A. To clarify, the position of the

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deputy for internal security has been abolished, and the LTSU now falls -- the chain of command would fall directly under the major for unit management and then the deputy superintendent for facilities management.
Q. Who is that person?
A. The major is Major Frank Cole, and the deputy superintendent for facilities management is Deputy Mark Krysevig.
Q. Maybe you can spell that.
A. K-r-y-s-e-v-i-g.
Q. This is somewhat redundant. Let me represent to you that before scheduling this deposition, I asked the Department of Corrections through Mr. Mericli, meaning that I conveyed the message through Mr. Merich, for the Department to designate an official of the Department who would be able to testify authoritatively and comprehensively on behalf of the Department with respect to its policy governing the possession of newspapers, magazines, and other published reading materials in the Long Term Segregation Unit and also possession of photographs by inmates in that unit.

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My understanding is that you were designated to speak on behalf of the Department. Is my understanding correct?
A. That's my understanding as well. Yes.
MR. MERICLI: That's my understanding as well.
BY MR. KRAKOFF:
Q. More specifically, you feel comfortable that you can speak authoritatively and comprehensively with respect to what purpose or purposes – penological, institutional – are said to be related to the policies governing access by LTSU inmates to reading materials and photographs?
A. Yes, I can.
Q. How many prisons in the Pennsylvania prison system have Long Term Segregation Units?
A. One.
Q. That one LTSU is located in Pittsburgh; is that right?
A. That's correct.
Q. In what year did the unit, the LTSU, actually begin operation at SCI Pittsburgh?
A. The first inmate came to the LTSU in April of 2000.
Q. Then from there, I suppose, other inmates came, and eventually it was populated by a fair number of inmates?
A. Yes.
Q. Had there been an LTSU in operation anywhere else before that first inmate came to Pittsburgh's LTSU?
A. In the Pennsylvania Department of Corrections?
Q. In the Pennsylvania –
A. No.
Q. Where within the SCI Pittsburgh complex is the Long Term Segregation Unit located?
A. The area is labeled as A-100, which is Building or Block A, third floor.
Q. I gathered from you earlier testimony that the Long Term Segregation Unit is considered a form of Restricted Housing Unit confinement; is that right?
A. Yes.
Q. Are there any other categories of housing units that are located on the third floor of that building?
A. No.
Q. How many pods does the Long Term Segregation Unit occupy?
A. There are six pods.
Q. How are they numbered or lettered or otherwise identified?
A. Well, there are eight – there are two sides, the A side and the B side, which have three pods each, and there are eight cells in each of the pods.
Q. Are the pods numbered or lettered? This isn't a test I'm giving. I'm just trying to get a fix on that.
A. We recently had a renumbering system. The cells are numbered by side, labeled A, B, and then –
Q. There's a B side?
A. There's an A side and a B side.
Q. So there would be three pods on A side and three pods on B side?
A. That's correct.
Q. It's my understanding that the Long Term Segregation Unit contains two levels, two classification levels of LTSU inmates. One is referred to as Level 1. The other is referred to as Level 2; is that correct?
A. That's correct.
Q. Level 2 is the level that inmates who are newly introduced into LTSU confinement are given?
A. That's correct.
Q. And Level 2 can also result when an inmate who has been promoted to Level 1 has done something to warrant a reversion back to Level 2 status?
A. That's correct.
Q. The A side and the B side, do each of those sides contain either Level 1 or Level 2, or are the two levels commingled?
A. They are presently commingled, although we try to segregate as much as possible certain inmates from others. Right now, there is a low number of Level 1 inmates. So cell space requires us to commingle the two.
Q. So under ideal circumstances, assuming that you have enough cells to house all of the Level 1 inmates that you have and all of the Level 2 inmates you have –
A. We would segregate.
Q. – you would segregate?

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A. Yes
Q. Are there times when you have been able to do that?
A. At least in the fashion of one pod, yeah
Q. I'm not going to go into detail with you about the various other policies and practices that exist in the unit, such as how long they're allowed out of their cell for recreation and visits and that sort of thing, because we have an answer to our complaint There are certain acknowledgments of those facts
But if I reduce it to its essence, this is a very high security segregation area in which the inmates are essentially in their cells for all but an hour or so a day; is that right?
A. That's correct.
Q. And are these cells single-occupant cells, or are there two inmates to a cell?
A. They're all single-occupant cells.
Q. Is that a matter of policy?
A. Yes
Q. So an inmate in one cell is separated from an inmate in another cell by a

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wall and by the doors that front the respective cells, is that right?
A. Yes
Q. So an inmate can't just open up his cell door and walk next door, for example, and then go into another inmate's cell?
A. No.
Q. That's prohibited, in fact?
A. Yes.
Q. In fact, it wouldn't even be possible unless an officer opened --
A. Only by mistake would that happen
Q. These cell doors are controlled by an officer in some sort of a bubble or a booth or electronically opened --
A. Yes.
Q. -- is that right?
A. Yes.
Q. How many inmates are typically held in Pittsburgh's LTSU on a given day? I'm only asking you for a rough number. I know it's going to vary probably from day to day to some extent, or I assume that's the case.
A. Actually, it's fairly stable. The central office has agreed to keep our maximum

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population in the LTSU at 40, and generally we have in the high 30s is our population
There are 48 cells on the unit, but this gives us some flexibility to meet some of those segregation requirements and rotation of cells when we have a cell off line or something
Q. Is there any sort of a library facility in the LTSU, either a law library or some sort of a general recreational library?
A. There is a mini law library in the LTSU
Q. There is no recreational law library in the LTSU, is that right? By recreational, I'll define that. What I mean is kind of a general circulation type library where you have books of fiction --
A. No
Q. -- biographies and that sort of thing?
A. No.
Q. Does the institution maintain a general circulation or general recreation library anywhere in the complex?
A. Yes.
Q. Where is that located?

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A. It's collocated with the school.
Q. It's in the school building?
A. Right.
Q. That library, does that also contain a law library?
A. Yes, it does.
Q. Is there somebody who supervises that library, like a librarian?
A. Yes.
Q. Does the librarian supervise both the law library and the general recreational library?
A. Yes.
Q. Do you know the name of the person who functions as the chief librarian?
A. I do.
Q. Who is that?
A. James West. I don't know how to pronounce it. We call him West. I have the spelling. Let me see if I have it on a piece of paper here. I'll have to look it up, because it's got a lot of different consonants in it.
Q. Is West kind of a shorthand way of --
A. West, yeah. James West is what he

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goes by
Q He's a civilian employee?
A That's correct
Q Do Long Term Segregation Unit inmates have physical access to the prison's library, meaning can they either on their own or by escort actually go into the library to use it?
A No
Q That's a matter of both policy and practice?
A That's correct.
Q How many of the inmates which generally is in the high 30s in the LTSU are Level 2, on Level 2 status?
A Well, as we sit here today, we have a population of 39 total inmates on the LTSU, three of which are Level 1
Q What was the total?
A Thirty-nine.
Q Three or Level 1?
A Correct.
Q Is that breakdown typically the case, somewhere in the 30s are Level 1 and a lower number level – I'm sorry Did you say

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three were in Level 1?
A Correct.
Q So that would mean 36 are on Level 2 as you speak?
A That's correct.
Q Is that a typical ratio, with a substantial majority being Level 2 and the minority being Level 1?
A I would say in general, yes. These may be a little bit skewed today, because we recently had a number of Level 1s that were moved, but generally in the single digits for a Level 1 and the remainder being Level 2.
Q As a matter of DOC policy, is there a minimum amount of time that an inmate must remain on Level 2 status before being eligible for placement on Level 1 status?
A Yes.
Q How long is that time?
A Ninety days.
Q As a matter of DOC policy, is there a maximum amount of time – an outer limit, in other words – that an LTSU inmate can remain on Level 2 status?
A No.

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Q So under DOC policy, a given inmate can remain on Level 2 status in the LTSU for a matter of many months or even several years; is that true?
A Yes
Q Can you tell me what the typical length of confinement on Level 2 status is? Just roughly, from X-number to X number of months or whatever I know we're fairly early into it, because it only opened in – was it 2000?
A Right. April of 2000
Q So we –
A Two-and-a-half years into this I wouldn't even hazard a stab at it. Many of the inmates that we have that are on Level 2 now came here to us in April of 2000 and have remained on Level 2. And some inmates that have subsequently arrived here have passed through Level 2, Level 1, and moved on to other institutions. So
Q Whether they moved from Level 2 to Level 1 is a determination that is – obviously is a determination that is made by prison officials; true?

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A True.
Q That's based upon the conclusions by the officials as to whether or not a particular inmate on Level 2 has progressed to the point where in the judgment of prison officials it would be warranted or appropriate to promote that inmate to Level 1; is that right?
A That's correct.
Q Is there either a document that reflects on kind of an ongoing basis, whether each month or every few weeks, how long a particular inmate has been on Level 2 status, or are there documents from which, even if it's not explicit – in other words, even if it doesn't say eight months – are there documents from which, if I had the documents, I could look at them and calculate how long the various inmates, the respective inmates, have been on Level 2 status?
A Yes
Q Which is it? Is there a document that keeps kind of a running tally of how long an inmate has been on Level 2 status?
A Yes.
Q Is that found on some sort of a

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compilation that would contain the names of all of the LTSU inmates, or is that something that could only be gleaned by looking at the individual institutional records of the particular inmate?

A. I don't know that we have a management tool that lists all the inmates and has all of their disciplinary custody times reflected on it.

Q. Disciplinary or you mean level times?

A. Both. Generally, those types of documents will be individual documents for that particular inmate.

Q. There is a document that contains, I assume, that contains a roster of the names of, for example, the 39 inmates who are there today? Each of their names will be on some sort of a list?

A. Yes. For instance, this is a roster, the recent roster. This one is dated June 3rd, '02.

Q. What information does that roster contain, other than the names and the institutional numbers of each of the inmates?

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Does it contain any other information?

A. This particular document contains the arrival date of the inmate, his inmate number, his name, the level that he's currently on, the counselor's initials, and when he's due for an annual review.

Q. I couldn't look at that -- in other words, the fact that it says inmate John Smith and that is his tenth month, and it would show that he's on Level 2 or Level 1; right?

A. It would show his level, but it wouldn't show how long he's been on that level.

Q. What I was going to say is: You'd get a skewed idea if you simply looked at that document, because it's possible that John Smith came in on Level 2, was on Level 1 --

A. That's correct.

Q. -- for six months, and now he's back on Level 2?

A. That's correct.

Q. Do you think that there is some way that a computer could generate -- one of the computers that you have in the institution that could generate the names of the respective inmates, how long they have been in the LTSU, and the total amount of time they have been on Level 2 status?

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A. Yes.

Q. I'd like to obtain that document just so that we can get a more specific idea of how long they remain -- I know the superintendent indicated that some of the inmates who came in on Level 2 have -- I think you said basically they have never left Level 2?

A. That's correct.

Q. Then others have left, and, in fact, others have left the entire unit itself.

MR. MERICLI: Well, the only difficulty with that is if discovery closes.

MR. KRAKOFF: I know. I would just end up at some point subpoenaing that information. So it might help us --

MR. MERICLI: All right.

MR. KRAKOFF: -- I would appreciate it.

MR. MERICLI: Sure.

MR. KRAKOFF: And I won't insist that you answer all my interrogatories on time, which is today.

MR. MERICLI: I know. I left a message for that.

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MR. KRAKOFF: And that wasn't sarcasm.

MR. MERICLI: All right.

MR. KRAKOFF: That was an attempt to be nice.

BY MR. KRAKOFF:

Q. What are the basic purposes and objectives of the Department's Long Term Segregation Unit? You don't have to -- I have summaries and some of the policies. But in a nutshell, what's the purpose and what are the objectives of the --

A. I suppose one of the primary purposes is to further ensure the safety and security of the Department. And secondarily, but certainly important, is to try to affect some behavioral change of the inmates that are assigned to the LTSU.

Q. Do the basic purposes of the Long Term Segregation Unit differ from the purposes of the Department's Special Management Unit?

A. I think obviously the overall purpose of the Department is to change behaviors, change unacceptable behaviors.

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Inmates that come to the LTSU in many cases have proven that the efforts in the Special Management Units have failed in that regards

In other words, the SMU is obviously a phase program, and it's structured in such a way as to change or modify behaviors to a more acceptable level. And as I say, many of the people that are in the LTSU now have failed to respond to the SMU environment.

Q. If I understand you then, the SMU stresses behavioral changes more, say, than the LTSU, is that right?

A. No. I wouldn't say that. What I'm saying is that the SMU is a -- I wouldn't say interim, but it's a level of effort to modify an inmate's behavior, and the LTSU is a more strict environment because of particular behaviors that this inmate may have demonstrated in the SMU.

Currently, the State's population roughly is about 38,000-plus inmates in our system, and what we have here in the LTSU represents one tenth of one percent of that overall population. And they are the most incorrigible, the most difficult, problematic,

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and have demonstrated the most behavior conflicts, if you will.

So we're all in the same effort to modify behavior, but these inmates have in many cases, most cases, have failed to respond to an SMU environment.

Q. So most of the inmates in the LTSU are people who have flunked out of or failed in the SMU?

A. That's an accurate statement. Yes.

Q. In a minority of cases, a person, I suppose, an inmate can come directly from some other prison where he wasn't in an SMU -

A. That's true.

Q. - to the LTSU, is that right?

A. Yes. That's true.

Q. Does SCI Pittsburgh have a Special Management Unit?

A. No.

Q. Where are the Special Management Units located within the system?

A. SCI Greene and SCI Camp Hill.

Q. Would the total population of the Special Management Units, to your knowledge, exceed that of the 30-something-odd inmates who

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are usually in the LTSU?

A. Yes.

Q. Do you have a sense of how many inmates have -- I'm using the word graduated. I don't know. You might have given a term that you use here, that is, promoted or been released from or something like that. But you understand what I mean by graduated?

A. Yes.

Q. Do you have a sense of approximately how many inmates have actually graduated from the Long Term Segregation Unit since its inception?

A. It's my understanding that so far twelve have left the LTSU. Two inmates have maxed out, and the other ten have moved on to other institutions.

Q. Under DOC policy, is Long Term Segregation Unit confinement considered a form of Disciplinary Custody?

A. Yes.

Q. Is it a form of Disciplinary Custody in the sense that inmates are sent there because they have been adjudicated by a hearing officer to have violated the DOC's rules, or do you mean

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disciplinary in some other fashion?

A. In most cases inmates come to the LTSU with Disciplinary Custody time. There have been some cases where inmates have come on Administrative Custody status.

Q. So the status -

A. But the reasons -- the main reasons for an inmate to come to the LTSU are the SMU failures, the behaviors, unacceptable behaviors in other institutions. So from that perspective, if we use the word discipline or disciplinary in a general sense, yes.

Q. But they're not necessarily serving disciplinary time; isn't that right?

A. They may not be.

Q. And, in fact, when an inmate comes into the LTSU with disciplinary time, that time eventually will expire?

A. True.

Q. Is there a document that reflects which of the inmates who are in the LTSU now actually are on Disciplinary Custody status as opposed to just Administrative Custody status?

A. Again, I'm not sure if we have one specific document that shows that.

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Q But --
A It would be easily retrievable from the mainframe or wherever, you know, as far as specific inmates
Q With respect to -- and I'm going to get into the specifics in a little while, but with respect to access to newspapers and access to magazines and access to books and access to photographs of family members and friends, does the policy or practice in the LTSU draw any distinction between those inmates who are on Level 2 status serving disciplinary time and inmates who are on Level 2 status solely on an Administrative Custody --
A. No.
Q. -- basis? They're both treated the same?
A. Correct.
Q As a broad proposition, would it be accurate to say that under DOC policy, the Long Term Segregation Unit is considered a form of Administrative Custody?
A. I'm not sure I understand the question
Q There is a -- is it AD# 802 that

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talks about --
A. Governs --
Q. -- Administrative Custody?
A. Right.
Q. Does that document, to your knowledge, place the LTSU under the rubric of Disciplinary Custody, Administrative Custody, or some other form of custody, if you know?
A. Well, the 802 doesn't address LTSU specifically.
Q. Is there any other document that you can recall which specifies whether this is a form of Administrative Custody or a form of Disciplinary Custody or some other --
A. Well, 6 5 1 DOC policy, our procedure manual, 6.5.1 references both under the LTSU and under the RHU specifically, addresses the 801 and the 802 which govern either Disciplinary Custody or Administrative Custody.
Q Now I want to focus our attention on DOC policies with respect to publications and then later photographs, access to photographs.
Under DOC policy, are general population inmates permitted to obtain

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newspapers from the outside, meaning from society, in any way?
A Yes
Q How may they obtain newspapers?
A They may individually subscribe to them through the mail, or they may access them through the -- they can buy them in the commissary, and they can also read them in the library
Q Isn't it accurate to say that no newspapers or articles from newspapers are permitted to come into this institution by regular mail unless the newspaper is sent directly from a publisher? Is that accurate to say? In other words, a relative or a friend isn't permitted to just send a newspaper into an inmate, or am I wrong on that?
A An inmate can't receive a newspaper directly from a relative You're right. It has to come from the publisher
However, you mentioned newspaper articles. That wouldn't be the case For instance, if there were some article, an obituary, for instance, or an article about somebody's neighbor or whatever that was being

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mailed in by a private citizen, that wouldn't be considered contraband
Q What if it just related to an issue that was not personal to the inmate, if it just was an editorial about the state of our economy or some article about the Middle East or something like that? Can they come in through regular mail from third parties?
A To what population?
Q I'm talking now exclusively about general population
A Yes, they could
Q You mentioned newspapers that come in Again, I'm focusing on general population prisoners, and by that I mean inmates who are not in some form of segregation
A. Right.
Q. They're permitted to subscribe. The publisher can then send a newspaper in through the regular mail, and the inmate is allowed to -- a copy -- not a copy. The newspaper is then delivered to the inmate, his cell?
A. Yes.
Q. Is the inmate in general population allowed to retain the newspaper in his cell?

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A. Yes.
Q. Is there any limit for general population inmates as to the number of newspapers they're permitted to receive from publishers through subscriptions? Is there any number? You're allowed to order three newspapers or five newspapers?
A. Not that I know of, no. The only limitation would be the cell property limitations.
Q. Meaning because of security factors or fire code issues, inmates have some limitation on the number of personal property items they're allowed to have?
A. Right.
Q. What is that? Is that done according to the number of boxes they're allowed to have in their cell?
A. Overall, there's a property limitation, yes. If an inmate chooses to have -- well, there's a limitation, for instance, on magazines. They can only have ten magazines at any given time. Newspapers, I'm not sure what the number is.
Q. But it's several? They could have

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several newspapers?
A. Yes. Yes.
Q. If somebody sends in an article from a newspaper, either a relative or a friend or somebody, they're allowed to read that in their cell and retain the article?
A. Yes.
Q. If they purchase -- meaning, general population inmates go to the commissary and purchase a newspaper from the commissary, are they permitted to take a newspaper back to their cell?
A. Yes.
Q. And the rest would be the same. They could keep those newspapers in their cell subject to general security and fire hazard issues?
A. Yes.
Q. Do you know offhand or could we find out if you don't know -- and I imagine you might not know specifically -- do you know what newspapers are sold in the commissary?
A. Let me see. The Post-Gazette weekly and Sunday papers are delivered by the commissary. Inmates can order most any paper.

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It's mailed into the mailroom and delivered to the blocks. And then these --
Q. That's subscription?
A. Right. And then the librarian gave me copies of the newspapers that are available or subscribed to at the library.
MR. KRAKOFF: Mr. Mench, may I --
MR. MERCLI: Sure.
MR. KRAKOFF: Maybe what I'll do is just mark this as an exhibit, and then that will be marked as Plaintiff's Exhibit 19.
(Whereupon, the document was marked as Plaintiff's Exhibit No. 19 for identification.)
BY MR. KRAKOFF:
Q. The newspapers from the commissary, are they delivered to the blocks, or do the inmates go to the commissary and --
A. They would get them at the commissary.
Q. The newspapers that are in the prison's general library, are they circulated? Meaning, can an inmate from general population take a newspaper with him out of the library?
A. I don't believe so. No.

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Q. But if an inmate comes to the library and wants to read one of the newspapers that are subscribed to by the librarian, assuming one is available at a particular time, they're allowed to read them in the library?
A. Yes.
Q. To your knowledge, is there any limitation on -- and you might have spoken to this already. If you have, I apologize for asking it again. But are inmates in general population allowed to subscribe to any newspaper of general circulation in the United States?
I'm not referring to the Communist Daily or MD4 Notes or whatever, but assuming that it meets censorship guidelines or screening guidelines, can an inmate order a newspaper -- can an inmate from general prison population order a newspaper from essentially anywhere in the United States?
A. Yes.
Q. If an inmate wants to order, say, from Puerto Rico or some other country, can they do that as well?
A. Yes.
Q. Let's focus on newspapers with

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respect to other classifications What other classifications of prisoners under DOC policy are permitted to receive newspapers through subscription via the mail and to retain the newspapers in their cells?

I'll just throw out some of the classifications that I'm thinking about If I'm missing some, you can add to that. But I'm thinking in terms of the traditional Disciplinary Custody classification in the RHU, the capital case management or death row I don't know whether Pittsburgh still has one.

A. Not anymore

Q. And the traditional Administrative Custody maximum and Close or whatever they're called I'm contrasting that to LTSU, just your garden variety Administrative Custody.

A. Do you have as one of your exhibits a copy of --

Q. I think I do.

A. -- 6 5 1

Q. Why don't we just identify the document, and we can all save time. Assuming that that's current, are you referring to the -- there's a procedures manual Then there's an

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LTSU handbook.

A. Show me the procedures manual.

There you go.

Q. Okay

A. There's been basically two corrections to this document, not that apply to your specific question, but this is reversed here. This should be -- Level 1 should read as Level 2 and vice versa, and this should say --

Q. The same information --

A. This has just been reversed It's been transposed, and this should read "any approved visitor". But with regard to incoming publications, that document is currently what we follow.

Q. So that we can identify for purposes of this deposition what that document is, it's Attachment A to Plaintiff's Deposition Exhibit Number 8, and it's a chart.

(Whereupon, the document was marked as Plaintiff's Exhibit No. 8 for identification.)

BY MR. KRAKOFF.

Q. The reason I asked that was because I didn't have -- in the copy that I received of

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Attachment A, the top headings didn't come out So why don't we label -- there are three categories?

A. Correct

Q. The one on the left, should the heading of that be RHU?

A. Correct

Q. And the one in the center of Attachment A, what should the heading of that be?

A. SMU

Q. And the third category, the one on the far right?

A. Is LTSU

Q. I can dispense with those. I have my answers to that question

I'm going to refer you back to Attachment A so that I can clarify Under the RHU category, it says inmate mail and incoming publications Do you see that in the far left column?

A. I see mail incoming publication.

Q. In the far left column-- I might have said category -- the RHU column, the one on the far left?

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A. The RHU, okay

Q. Where it says mail in the category of mail incoming publications?

A. Yes.

Q. This means that an inmate in the RHU can receive legal personal correspondence as per Administrative Directive 803?

A. That's correct

Q. And then it says inmate mail and incoming publications. What does that mean?

A. Mail and incoming publication?

Q. Right.

A. Well, that would be what we're speaking of --

Q. That would be the category?

A. That's the activity or whatever or the category running down the first left column

Q. So ADM 803 would describe --

A. That governs mail.

Q. And incoming publications?

A. Right.

Q. So if I want to see what inmates in the RHU are entitled to receive in terms of incoming publications --

A. Basically, what it says is that as

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inmate, regardless of -- in this case, it says both statuses -- that means either Disciplinary Custody or Administrative Custody -- can receive one newspaper, ten photographs, and any legal and/or personal correspondence that would be permitted by the 803. So, for instance, things that were -- the Publications Review Committee would allow, those kinds of things.

Q. So what this would mean is, when we say RHU, because you said earlier that the LTSU is in the RHU complex?

A. Right.

Q. This column says that RHU is referring to --

A. The regular RHU.

Q. -- the regular RHU?

A. Correct.

Q. Which would consist of Disciplinary Custody inmates in the regular RHU and Administrative Custody inmates in the regular RHU?

A. Yes.

Q. So an inmate who is in Disciplinary Custody status in regular RHU as opposed to the Long Term Segregation Unit would be governed,

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depending upon what phase he was in, I guess once you reach Phase 2 either --

A. No. Wait a minute. Phases are not a term that we use in the LTSU. Are you speaking of --

Q. No.

A. I'm sorry.

Q. We're in the RHU regular. I don't even know --

A. Okay. There are no phases.

Q. There aren't. Okay. So that I have this pinned down, you're in the regular RHU on Disciplinary Custody status. How many newspapers -- and we can refer to 803. I want to make sure that I'm not confusing anything. Are inmates in Disciplinary Custody status in the regular RHU, are they allowed to receive newspapers in their cells?

A. One newspaper.

Q. One newspaper?

A. Correct.

Q. And are they allowed to exchange that newspaper?

A. One for one.

Q. And where do they receive the

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newspaper from, subscription? Or do they --

A. It would be a subscription.

Q. Subscription only?

A. Right.

Q. Then is an inmate in Disciplinary Custody status in the regular RHU entitled to have any photographs in his cell while he's in the regular RHU?

A. Yes.

Q. How many is he entitled to?

A. Ten.

Q. These can be of family members, friends, or anybody else?

A. They could be of anything as long as it passes the Publication Review Committee's standard.

Q. So you're dealing there with -- they couldn't have nude photographs, for example?

A. Correct.

Q. Then the third column deals with Level 1 and Level 2 in the Long Term Segregation Unit; correct?

A. Correct.

Q. An inmate on Level 1 status in the Long Term Segregation Unit is permitted to have

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one newspaper in his cell; is that true?

A. That's true.

Q. And five magazines; true?

A. That's correct.

Q. And how does he get those newspapers? Do they come from subscription only?

A. Yes.

Q. So he couldn't, for example, purchase a particular newspaper from the commissary, a particular --

A. I don't recall whether or not the newspaper is an item that's permitted to be purchased in the commissary, but I believe it's strictly by subscription.

Q. Can you note, before we leave here, can we track that down?

A. Uh-huh. If you would like, let me step out here for a minute.

Q. I'd appreciate that. Okay.

(Whereupon, a brief recess was taken.)

A. To answer your question, newspapers are on the commissary list for a Level 1 inmate. So they can obtain a newspaper either

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by purchasing it at the commissary or subscribing to it

Q Did I ask you what newspapers are available in the commissary?

A According to this note I got from my secretary, Post-Gazette weekly and Sunday papers are delivered to the commissary.

Q In no instance, whether an inmate is in the general population, in the RHU regular, the Administrative Custody regular, or the Long Term Segregation Unit are people allowed to simply drop off a newspaper for an inmate; is that right?

A Correct. I would say -- let me say that Inmate X in general population could give Inmate Y a newspaper.

Q I understand that.

A Okay

Q You have seen old movies where somebody will come with a pie and deliver a pie for an inmate?

A. Right

Q Then it will be brought to his cell?

A No

Q That doesn't happen here with

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newspapers; does it?

A No, it doesn't.

Q Is a Level 1 inmate in the Long Term Segregation Unit allowed to receive articles from newspapers through the mail while he's on that level?

A. Yes.

Q So he could receive particular articles?

A. Yes.

Q Let's focus on Level 2. What is the policy with respect to the receipt of newspapers by Level 2 Long Term Segregation Unit prisoners?

A. They're prohibited.

Q What about a situation where somebody sends in a particular article from a newspaper that's been clipped and placed in regular mail? Is an inmate allowed to receive that?

A. It depends.

Q. What would that depend upon?

A. Generally -- well, you used the example -- we used the example before that if it had some connection to the inmate, we wouldn't stop that from going in.

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Q But if it didn't have a connection, as a general proposition, that's not going to be allowed in; is that correct?

A That's correct

Q Since I believe your testimony was that the newspapers don't circulate from the main recreational prison library, an inmate on Level 2 status is not going to be able to obtain one of the newspapers that is subscribed to by the general library, is that true?

A. That is correct

Q And there are no newspapers on the unit, in the Long Term Segregation Unit, which may be provided to inmates from officers under the existing policy; is that correct?

A. Correct.

Q Again, if this is the second time, a Level 2 Long Term Segregation Unit inmate does not have access, physical access, to the main prison library, meaning he can't be escorted to and does not go on his own to that library; is that right?

A. That's correct

Q Is there a policy that prohibits Level 1 inmates who have the one newspaper that

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you were talking about from providing that newspaper to a Level 2 prisoner?

A Yes

Q That's strictly prohibited; isn't it?

A. Absolutely.

Q. If corrections officers find a newspaper in the cell or in the possession of a Level 2 inmate, that would be considered contraband; true?

A. True.

Q And that will be confiscated from the inmate; will it not?

A. Yes.

Q As a matter of fact, that would be considered some sort of violation of prison disciplinary rules that could subject the inmate who has that contraband, could subject him at least potentially to some sort of disciplinary action?

A. Yes.

Q And that would certainly, I would assume -- and correct me if I'm wrong -- that would be something that could in fact retard any or delay any promotion from Level 2 to Level 1?

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I'm not saying in itself necessarily, but that would be a negative blot on his record?
A. Sure
Q. The mini library that you referred to earlier in the Long term Segregation Unit, is that in a special room of some sort?
A. Yes.
Q. Inmates, are they given direct physical access to the mini law library, or do they simply order things from the mini law library to be brought to their cell?
A. They physically go to the mini law library
Q. If there is a policy, how many inmates are allowed at any one time in the library? Is it one?
A. One.
Q. Is there some sort of a time limit on how long a particular inmate can spend? Is there a general time frame on a particular visit?
A. Generally, there are -- I believe it's a two-hour period of time that they're in the mini law library at one time for one session

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Q. Is there a limit -- can they go to the library more than once a week?
A. Depends on the demand. And it's a matter of, you know, first come, first serve kind of a thing. And they maintain a roster of people requesting time in the law library.
Q. Obviously, there are no newspapers in the mini law library; is that right?
A. Correct.
Q. Are the only books in the mini law library are legal materials?
A. Right.
Q. Have there been occasions where inmates have been admitted to the Long Term Segregation Unit and therefore initially placed for at least the first 90 days on Level 2 status, have there been occasions where those inmates came into the Long Term Segregation Unit with subscriptions to newspapers?
A. I'm sure there are.
Q. Is there a policy that says what's to happen to the newspapers that are coming in through that subscription?
A. They're held for them in their property, but they're encouraged to cancel their

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subscriptions since they're not allowed to have them
Q. That property will be kept -- they don't have access to those newspapers in their property?
A. (Witness shaking head.)
Q. Is it a box of some sort?
A. Right.
Q. They don't have access to that?
A. They do not
Q. Any newspapers that an inmate has accumulated prior to coming into the Long Term Segregation Unit, those newspapers are taken and either stored, or, I suppose, with the consent of the inmate, either sent out of the institution or destroyed; is that right?
A. That's correct. When it reaches that volume that's permitted, yes.
Q. General population inmates are permitted to have magazines in their cells?
A. Yes.
Q. As with newspapers, they can order a magazine directly from a publisher by subscription; is that true?
A. Correct.

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Q. And are they permitted to receive articles from third parties from outside the prison in envelopes? Somebody clips an article, sends it to an inmate who is in general prison population from a magazine. Is the inmate ordinarily allowed to receive the article?
A. Yes
Q. At least with respect to general population inmates, those articles don't necessarily have to relate to the inmate or his community; is that right?
A. That's correct.
Q. So if it's an article about some political event, some cultural event, or whatever, that can come in whether it deals with the inmate or his family or his community?
A. True.
Q. Are magazines in the -- I'll call it the main prison library or the general circulation library. Does that receive magazines for inmate use on the premises via subscription, to your knowledge?
A. Yes. In fact, I'm not sure, but I think I saw some magazines on this list I gave you.

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MR. MERICLI: All I noticed was Newsweek, which had been canceled.
THE WITNESS: There may be another set.
MR. MERICLI: And a reference to the New York Times magazine, which had also been, I believe, canceled.
THE WITNESS: Then I'd have to -- I need to check just to verify with the librarian.
BY MR. KRAKOFF:
Q. Will you do that now so that we don't forget, if you don't mind.
A. Sure.
Q. Thanks. I'm going to ask about whether those are allowed to circulate out. You might know that already. It may be the same as newspapers.
A. No. They're not going to be allowed outside the library.
(Whereupon, a brief recess was taken.)
A. The librarian went to lunch. He's going to call me when he comes back, and we'll get an answer.

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Q. Are magazines, individual magazines, sold in the prison commissary?
A. I don't believe so.
Q. Maybe that's something else we can confirm. Are you pretty sure they don't sell --
A. I can check on that, but I am pretty sure we don't sell magazines through the commissary. They have to subscribe to them.
Q. So there's a difference. One is an inmate walks into the commissary, which I assume that there are some goods in the commissary that they sell?
A. Right.
Q. So he walks into the commissary store or exchange or whatever. One scenario is there are magazines there. He can purchase it, gives the person in charge of the commissary some tickets for the purchase price, and then walks out.
The other is that he can get a subscription form from the commissary. The third is he has to write away to the magazine publisher and get a subscription. Is it the third thing that you think --
A. Right.

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Q. We'll confirm that though. Can I refer you back to Deposition Exhibit 8, that Attachment A? Can you interpret this for me? With respect to regular RHU Disciplinary Custody, are they entitled to have any magazines in their cells through subscriptions?
A. No.
Q. What about Administrative Custody?
A. No.
Q. Level 1, Long Term Segregation Unit inmates, magazines?
A. Correct.
Q. What is this -- it says one newspaper, five magazines. Does that mean that they are entitled to have five magazines?
A. That's correct. Level 1s can have one newspaper on a one-for-one exchange and then five magazines. Of course, that would be a one-for-one exchange as well.
Q. The five magazines would have to be obtained through --
A. Subscription.
Q. So somebody on a regular Administrative Custody, did I understand you correctly on regular Administrative Custody in

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the RHU is not allowed to have magazines?
A. That's correct.
Q. Level 2 Long Term Segregation Unit inmates, are they permitted to have any magazines?
A. No.
Q. So there is no place on the unit that they can obtain a magazine, either from an officer or in the law library or from another prisoner who happens to be Level 1, there is no way that they can have any magazines in their cells under any circumstances; is that correct?
A. That's correct.
Q. What is the policy with respect to inmates on Level 1 of the Long Term Segregation Unit receiving articles from magazines that are sent in by relatives or friends or somebody else on the outside into the unit? In other words, something clipped from Time Magazine or Newsweek, are they allowed to receive those?
A. Yes.
Q. Would those articles be limited, as in the case of newspapers, to articles that have some personal connection to the inmate or some connection to his specific community?

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A No
Q So they can receive clipped articles that deal with the Middle East or any other thing?
A Yes
(Whereupon, there was a brief interruption)
MR KRAKOFF Why don't we go back on the record
BY MR KRAKOFF
Q Even though there is not a specific question, you can --
A He's going to bring a list of the magazines that are subscribed to in the library
He clarified one thing that may or may not be of interest to you The newspapers and magazines, once they are ready to be discarded by the library, are provided to our SNU and the hospital and our clinic units These are inmate populations that generally don't have access to the library
Q Which would be the Special Needs Unit for SNU?
A Right.

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Q The hospital, and what was the --
A The other one is what we call the clinic, but it's actually our reception unit.
Q These are where new inmates come into the system?
A Right. They're segregated from our general population for a period of time And the question you asked about the listings, there is no specific list by title that the LTSU inmates can review. How they go about obtaining the books is by subject matter, author, or if they know the title
Q So if they want a book about President Teddy Roosevelt, can an inmate request the staff? Is that the way they would do it?
A There is a specific --
Q Form?
A This is the form. In fact, if you have the inmate handbook, you should have a copy of that form.
Q Let me identify the inmate handbook by number, which is Plaintiff's Exhibit Number 9.
(Whereupon, the document was marked as Plaintiff's Exhibit No. 9 for identification)
A What is the date?
Q October 4, 2000
A You have -- this has been -- the handbook, inmate handbook, was revised in January of 2001 So this version is obsolete
MR KRAKOFF Can I have that, Mr. Mericli, since there's been a more recent inmate handbook?
MR MERICLI For SCI Pittsburgh?
MR KRAKOFF Yes, for the Long Term Segregation Unit?
MR MERICLI For the Long Term Segregation Unit.
MR KRAKOFF Right.
MR MERICLI Okay.
BY MR KRAKOFF
Q When did that come out?
A January 2001
Q So that would be about five months after Plaintiff's Exhibit 9?
A Well, there's some significant changes though Okay?
Q Yeah. I would like to see that.
MR MERICLI Do you have an extra copy?
THE WITNESS I can make a copy of this one.
MR MERICLI That would be best. And if you can have two copies, one for me and one for him Kathy should have gotten it for us.
MR KRAKOFF I don't think I have that.
MR MERICLI Okay.
THE WITNESS I apologize Mine may have some notes written in it.
MR KRAKOFF Why don't you --
MR MERICLI Get us a clean copy
THE WITNESS We'll get you a clean copy that doesn't have any of my scribbling in it.
BY MR KRAKOFF
Q Is there anything -- while we're here, so I don't have to come back, is there anything that would relate to either magazines, photos, or newspapers, other than the fact that there is a form attached to it for ordering, that would be covered by that, any changes?
A There is nothing of any substance in

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the handbook that wouldn't be covered by that chart that we looked at with regard to privileges
Q May I just see the form that is provided to inmates to order books from?
(Witness hands document to counsel.)
THE WITNESS: Let me get someone on the job to get -- we need two copies?
MR. MERICLI: Yes, please.
MR. KRAKOFF: Maybe what I'll do is make this a separate exhibit
(Whereupon, a brief recess was taken.)
BY MR. KRAKOFF:
Q I can just identify this
A. I'll get you a copy of that as well.
Q I'm going to identify this as Plaintiff's Exhibit 20.
(Whereupon, the document was marked as Plaintiff's Exhibit No. 20 for identification.)
BY MR. KRAKOFF:
Q This comes from the revised Long Term Segregation Unit Rules and Regulations, Inmate Copy, dated January of 2001 which I'll be

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receiving sometime in the future. This is the last page of that document. It says RHU Law Library Book Request Slip. That's going to be Plaintiff's Exhibit 20.
How does this system work? What is the procedure for an inmate in the Long Term Segregation Unit to obtain a book from, if you know? Apart from, I take it, that the inmate fills out this document?
A. Right.
Q. It tells what kind of book or what category of book he wants?
A. Right.
Q. Or a specific title, if he knows it?
A. Right.
Q. And then somebody delivers that request slip --
A. The librarian assistant makes at least two trips to the LTSU weekly. They will pick up the slips, and a few days later the books should be delivered to the inmate.
Q. The inmates who are on Level 2 status in the Long Term Segregation Unit, they can participate in this book system; is that right?

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A. Yes.
Q. Is there a limit on the number of books an inmate is allowed to receive per week?
A. Two books.
Q. They can keep those in their cells. They can read them in their cells?
A. And they exchange it one for one.
Q. So they finish the first book. They start reading the second book, and they can in the meantime order another book?
A. That's correct.
(Whereupon, there was a brief interruption.)
MR. KRAKOFF: Is this a clean one?
THE WITNESS: Yes.
MR. KRAKOFF: Pursuant to an agreement that we have, I'm not turning anything over without telling Mr. Merich. I'm not giving anything to any of the inmates
THE WITNESS: Please don't.
MR. KRAKOFF: No. No. If I assume down the line that there may be a need for me to share anything with the representative plaintiffs, Mr. Merich will be informed of that fact.

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MR. MERICLI: And I can go to court.
MR. KRAKOFF: If we can't reach an agreement, but I'm not going to turn anything over, even if it appears to be innocuous.
MR. MERICLI: I want to say as well that I have had the pleasure of working with Mr. Krakoff in at this point, at least coming to the top of my head, three major cases where we had these confidentiality agreements, and they have never been breached.
THE WITNESS: We certainly appreciate that, because even though it may seem innocuous, oftentimes there are security and safety issues that are associated with the release of some of these documents.
BY MR. KRAKOFF:
Q. So that I understand though with respect to this document which will be marked Plaintiff's Exhibit 21, Long Term Segregation Unit Rules and Regulations, Inmate Copy, does that mean that the inmates receive these?
A. Absolutely. The day they get here, they get a copy of that.
Q. I'm still not going to turn this -- in fact, there is no need for me to turn this

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over to any of them, because they have --
A They already have one Right
Q This will not be turned over to them This will be marked Plaintiff's Exhibit 21
(Whereupon, the document was marked as Plaintiff's Exhibit No 21 for identification)
BY MR KRAKOFF
Q Before we took a break, I was asking you about specific articles being cut out and sent into the Long Term Segregation Unit
So that I understand correctly, Level 1 inmates can receive specific articles from friends or neighbors, relatives, any third person? They can receive specific articles from magazines through the mail, is that right?
A Yes. So could a Level 2
Q And a Level 2 inmate who receives a specific article, I believe you testified that that article from a magazine doesn't have to relate to the inmate in any way? It can just be some general --
A I think you got it reversed
Q Okay

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A. The Level 2 inmate, there should be some nexus between the content of the article and the inmates.
Q Okay Level 1 inmate?
A. Level 1 inmate would be regardless of what the topic was But because obviously they have access to a magazine, they have access to a newspaper, there is no -- there is no...
Q So as I understand it then, the access of inmates on Level 2 status in the Long Term Segregation Units to specific magazine articles sent in from -- clippings sent in from third parties, that's much narrower than what the access that inmates on Level 1 would have to magazine articles, is that true?
A. Yes.
Q It's much narrower and different than what inmates in a general prison population would be allowed to receive?
A. True.
Q. So the nexus to an inmate -- and I'm not going to ask you to give me every scenario, but it might be something about -- it could be an obituary about a relative dying that a Level 2 inmate would be allowed to receive; true?

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A. Uh-huh
Q Or maybe an article about one of his relatives that appears in the magazine that was cut out?
A Uh-huh
Q But if it's about President Bush doing something or the stock market or something of just general interest to the community at large, that is not going to be available to the Level 2 LTSU inmate, correct?
A Correct.
Q The final topic of articles that I want to -- article is a poor choice of words Items that I want to discuss with you relate to photographs. We can go back to the chart or the attachment on Plaintiff's Exhibit 8.
An inmate in the RHU on Disciplinary Custody status, the garden variety, regular, I think is the way we're referring to RHU status as opposed to -- let me start again
I'm focusing first on Disciplinary Custody in the regular RHU is an inmate permitted to have any photographs in his cell?
A Yes
Q How many photographs is a regular

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RHU Disciplinary Custody inmate permitted to have while he's serving his disciplinary time?
A Ten.
Q Is an inmate on Disciplinary Custody status, regular RHU Disciplinary Custody status, is he permitted to bring photographs that were in his possession before he was transferred into Disciplinary Custody status, or is he required to receive those through the mail while he's in Disciplinary Custody status? Do you know what I'm saying?
A. I understand your question I'm not sure I know the answer. I believe that they can bring photos from their cell, in their cell property, to the RHU
Q Do you know whether they're allowed to receive photographs after they have been placed --
A. Yes.
Q. -- in Disciplinary Custody?
A. Up to the limit of ten.
Q. So Mr. X is convicted of refusing to obey an order, is sentenced to the RHU, Disciplinary Custody status for 30 days or whatever. While he's in there, somebody can

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send a photograph in to him, and he's allowed to have that in his possession, assuming it doesn't violate any nudity provisions?
A. Right.
Q. Or other security matters, right?
A. That's correct.
Q. Do you know what the rule is with respect to the Special Management Unit inmates? I know you don't have one here
A. Only what I can read here
Q. Then I can read that. Then what about Administrative Custody inmates in the regular RHU? Are they permitted to have photographs?
A. Yes
Q. How many?
A. Ten
Q. They're permitted to either bring them in, to the best of your knowledge, or to receive them through the mail while they're in Administrative Custody?
A. Correct.
Q. The Level 1 Long Term Segregation Unit inmate, is that inmate allowed to have any photographs in his cell?

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A. No
Q. And Level 2?
A. No
Q. The photographs that the categories of inmates are permitted to have in their cells, we talked about in general prison population, Administrative Custody, and routine regular Disciplinary Custody, do those photographs have to be of the inmate's family or friends? By family, I mean relatives, a spouse, children, or friends; or can they be broader than that?
A. Is this in general population?
Q. Yes, in general population
A. Actually, if they're allowable photographs, it doesn't matter
Q. It can be of anything? It could be of a mountain?
A. Right.
Q. What about in the – that was general population; correct?
A. Right.
Q. What about photographs for RHU, Disciplinary RHU, Administrative, can it be of anything?
A. They're allowed to have photos, and

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the photos are allowable by the 803. The subject matter of the photo doesn't matter
Q. If a Long Term Segregation Unit inmate is found to have a photograph in his possession, either on his person or somewhere in his cell, is he subject to having that treated as contraband and the photograph taken from him?
A. Yes
Q. What will happen to a photograph? I don't know if you have ever had that happen?
A. Yes
Q. What happens to a photograph that's taken as contraband?
A. It's placed in his property
Q. If a photograph is mailed in to an inmate at the LTSU, who is an occupant of the LTSU, what will happen to the photograph if – I assume that if the envelope is open and the mailroom employee sees that there is a photograph, sees that the person is in the LTSU, what happens to the photograph?
A. The photograph will go in the inmate's property
Q. The inmate is not, while he is an LTSU prisoner, is not allowed to go to his

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property and look at those photographs; is that right?
A. The only reason would be occasionally inmates are allowed to go to their property to obtain different things, you know, to exchange a property or something like that. At that time they may, as they go through their property –
Q. They may glance at it?
A. Right.
Q. If an inmate said –
A. "Can I look at my pictures?"
Q. – "Can I look at my pictures?"
A. No.
Q. Can't do that?
A. Right.
Q. Is an inmate –
(Whereupon, there was a brief interruption.)
MR. KRAKOFF: Why don't I – maybe you can help the deputy with various exhibits. What I'm going to do is I'm making reference to these exhibits. They're just going to be attached. I'm not offering. Obviously this isn't an evidentiary –

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MR MERICLI Sure
MR KRAKOFF I'm going to probably attach most of them 1 and 2 are the interrogatories and the answer I'm not going to deal with those.
(Whereupon, Plaintiff's Exhibit No 3 was marked for identification)
BY MR KRAKOFF.
Q So Plaintiff's Exhibit 3, this is a grievance document addressed to Ronald Banks It's from Carol?
A Scire.
Q She's the regular prison grievance officer?
A She's the grievance coordinator Right.
Q You'll see this says, "The items that were confiscated were deemed not to be religious material by Deputy Dickson and the Chaplaincy Department You are currently a Level 2 in the LTSU and are not permitted magazines or newspapers."
You may not remember the specifics of this I refer you also to Plaintiff's Exhibit 4, which relates to the same matter.

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I'm not going to ask about what specific document was involved, but do you recall how the religious issue became involved? What relevance does whether something happens to be religious material have to the receipt of either a magazine or a newspaper, if any?
A. Well, procedurally, we go back to what is allowable and what is not allowable. Religious materials, if it's determined to be religious materials, an inmate can have up to the limit of his one records box of religious materials
If there is a question as to whether or not an item constitutes a religious item, it's referred to the chaplain's office for review And they then make that determination that yes, this is in fact a religious document or not. One of the examples -- and I don't know if it's specifically this or not, because that was over a year ago.
Q This was the Christian –
A. Christian Science Monitor.
Q There were two things. One was the newspaper?
A. Right.

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Q One was a magazine?
A Yeah And the magazine was determined to be a religious document, and he was permitted to have that The Christian Science Monitor, as you know, is a secular newspaper, and it was not deemed to be religious material, and that was denied
Q So the magazine was allowed to come in --
A That's correct
Q -- because it was religious in nature?
A Right
Q The Christian Science Monitor, because it was a secular newspaper, was not allowed?
A That's correct
Q So theoretically if – I'm not asking you to make a decision in this case, but just so I understand it, if, for example, somebody sends in the Watch Tower, I don't know if you're familiar with that?
A. Jehova's Witness document?
Q Right Something like that that might be considered religious in nature?

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A I would assume that that would be legitimate religious material. We're not -- we don't -- we're equal opportunity here as far as that regard.
Q There's another interest at stake here, and that is not so much the right to read in general, assuming there is such a right, but religious freedom is at issue?
A. Absolutely.
Q You have something that may draw – I assume that's what the distinction is, that this is something that because of the First Amendment right to engage in religious issues, you're going to make an exception to the general rule about magazines or books?
A Correct
Q So a Bible can come in?
A Right.
Q A Koran can come in?
A. Right.
Q. And theoretically, I suppose, or at least arguably if there is a book that comments on the Bible written by some theologian, that may be able to come in, too?
A. Right.

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(Whereupon, Plaintiff's Exhibit No 6 was marked for identification.)
BY MR. KRAKOFF:
Q. Plaintiff's Exhibit 6, this is a document that you apparently sent to LTSU inmates as a whole regarding "GRATERFRIENDS". It's dated February 8th, 2001. I take it that this is your signature?
A. I haven't seen it yet.
Q. I'm sorry. You'll see it will say Plaintiff's Exhibit 6.
MR. MERICLI: Here's 6. This is it.
BY MR. KRAKOFF:
Q. Is that your signature?
A. Yes, it is.
Q. "GRATERFRIENDS" as I understand it – instead of my saying as I understand it, what is the publication "GRATERFRIENDS" in general? What kind of publication is that?
A. It's a newsletter that's published somewhere I believe in the Philadelphia area, and most of its contributors are inmates, for inmates.
Q. But it's published – it's not

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actually publish at Graterford, for example?
A. No. No. I believe it may have had its genesis from inmates or inmates families in Graterford or whatever, but it's expanded.
Q. This is something that a fair number of inmates at SCI Pittsburgh who are in, say, the general prison population do receive "GRATERFRIENDS"?
A. Yes.
Q. Do you know whether this is subscribed to, or is this something that is just –
A. I honestly don't know.
Q. Does "GRATERFRIENDS" deal with, if you know – have you ever looked at issues of "GRATERFRIENDS"?
A. Yes. The superintendent gets a copy, in fact, and he distributes it to the two deputies.
Q. Does this deal sometimes with prison-related, issues?
A. Oh, yeah.
Q. Does this ever deal with issues related to non-prison matters?
A. Yes.

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(Whereupon, Plaintiff's Exhibit No 7 was marked for identification.)
BY MR. KRAKOFF:
Q. Now, Plaintiff's Exhibit 7, which will be in the next folder, this is a document issued June 8, 2000. It's a policy statement, 6.5 I, dated September 1, 2000. Do you know, is this the current policy statement?
A. Yes, it is.
Q. You'll note that it says on the second page of the document, it says Custody Level 5H (CL 5H)?
A. Correct.
Q. What custody level – 5H is the custody level for Long Term Segregation Unit; isn't it? I think that's on page 3.
A. That's correct. It is.
Q. Is that the highest security level in the prison system?
A. Yes.
Q. Then Plaintiff's Exhibit 8 we have already made reference to.
A. I would say that's the highest classification, not incorporating capital cases.
Q. Plaintiff's Exhibit 8, which is a

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procedures manual dealing with administration of Security Level 5 Housing Units, is this the current policy?
A. Yes, it is.
Q. Plaintiff's Exhibit 9, which is that document we discussed before, the –
A. Right.
Q. – October 4, 2000 LTSU handbook. Were you involved in the preparation of this handbook?
A. Yes.
Q. I can just take you through –
A. Do you want to go through this old version? It's kind of overcome by more recent documents. So...
MR. MERICLI: That would be the one that we have as Exhibit 21.
BY MR. KRAKOFF:
Q. I'm not going to question you about this.
(Whereupon, Plaintiff's Exhibit No. 13 was marked for identification.)
BY MR. KRAKOFF:
Q. If you can turn to Plaintiff's Exhibit 13, which is DC-ADM 8027?

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A. This isn't the 802
MR. MERICLI: Thirteen. That's 12. I'm sorry. I gave him the wrong exhibit
BY MR. KRAKOFF:
Q. Does this essentially reflect current policy with some -- as I understand it, there have been a couple --
A. Numerous bulletins
Q. Some bulletins since then?
A. Yes
Q. Does this --
A. I would like to verify that.
Q. Okay. Maybe the way we can do it is, you can just relate to Mr. Mersch if anything -- we're only dealing here with newspapers, magazines, books, and photographs.
If any of this 802 has been revised in connection with those matters, then you can notify Mr. Mersch, and Mr. Mersch will either send me a copy of the policy bulletin, the changes, or he can just relate to me in a letter the changes. Would that be acceptable?
MR. MERICLI: Yes
BY MR. KRAKOFF:
Q. Otherwise, I'm going to assume that

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this policy is current as to anything relevant in this case. Okay?
A. Uh-huh.
THE WITNESS: Is this a point at which I might bring out the 6.5.1?
MR. MERICLI: Yeah. I guess so. I thought he might ask you about it, but he didn't. There have been revisions -- there are proposed revisions to the 6.5.1 that are of some significance to the inquiry that you're making in this case.
There would seem to be, from our point of view, neither any restrictions on disclosing this information to you in terms of higher authorities in the DOC, nor any particular reason not to disclose it to you in connection with this case.
The only problem is that they are still not yet, so to speak, enacted or promulgated, and consequently may not appear in the forms in which they're being discussed right now.
MR. KRAKOFF: Why don't we do this. Why don't we go off the record, unless you would rather remain on the record.

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MR. MERICLI: It's up to you.
(Whereupon, a discussion was held off the record.)
(Whereupon, Plaintiff's Exhibit No. 14 was marked for identification.)
BY MR. KRAKOFF:
Q. Let me show you Plaintiff's Exhibit 14, which is ADM 803. This is dealing with inmate mail and incoming publications. Is this document still current, as far as you know?
A. I think we just got a revision of this.
Q. Maybe what we can do is there is no need for you to get that copied now, but maybe what we can do over the next couple of days is that if you can --
A. I'm going to give you the most recent 802 and 803.
MR. MERICLI: If you could send them through to me.
MR. KRAKOFF: I'll keep this here. You'll send it to Mr. Mersch, and he will send it on to me.
(Whereupon, a discussion was held off the record.)

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BY MR. KRAKOFF:
Q. The question I put to you is: First of all, does the Department of Corrections believe that there are any penological, institutional, or other governmental interests that are related to the policies that I have asked you about today -- namely, access by LTSU inmates, Level 2 -- to newspapers, magazines, to books and to photographs?
And I want to -- I'm just asking you that as a group. Is it the Department's position that these policies, each of these policies, relates to a penological, institutional, or some other governmental interest?
A. Yes. They have penological interest. You mentioned books, which I don't know is, you know, legitimately a part of that group, because I don't know --
Q. I agree with you. As I have found out more about the books, I don't know whether that's in the mix. I'm going to cover it in any event.
A. The penological interests are --
Q. Let's break this down so that we

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have this in kind of a neat -- what penological interest or interests are served, are related -- let me start this again, because it's very important

Will you identify, with respect to the newspaper policies that governs receipt of newspapers and access to newspapers by Phase 2 prisoners, will you describe what penological interest or interests relate to that policy?

A. First, if I may, as I pointed out earlier, we're dealing with the one tenth of one percent of the inmates in the State population that have proven to be the most problematic and the most difficult behavior problems

We have -- I'll start by saying I think there are three reasons why we have chosen to deny certain privileges to inmates in the Long Term Segregation Unit, and the key --

Q. If I may -- and I'm not going to interrupt you once more I promise. So that we know, are the three reasons that you're about to describe, are those three reasons applicable to the newspapers, magazines, and photographs?

A. Yes, they are

Q. So you're going to now identify the

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three penological reasons for those policies; is that right?

A. Yes

Q. Okay.

A. The first and most important one is as a means of behavior modification. And by that, I mean that a privilege is an earned thing based on compliance and modification of negative behaviors.

I think that's the most important reason why we have these privileges and denial of these privileges, and obviously we are attempting to do the best we can to modify the inmate's behavior so that eventually he can become a more productive citizen; or in the fact that he's never going to leave an institutional setting, that eventually he may be able to integrate into the general population in the institution.

The second reason that we use this privilege system and denial of those privileges is that the denial or the reduction of property in the inmate's cell allows us to more carefully and completely protect both staff and other inmates.

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And by, that I mean the more property an inmate has in his cell, the more capability he has to hide contraband or conceal items that he obviously should not have in his cell. So that's another reason for restricting these items

The third reason is that it's been proven that these types of items in the hands of the wrong people can be used against staff or against other inmates as weapons or as items to inflict harm on other people, to the extent of rolling up a magazine and creating a blow gun, using items to fling feces or urine

People obviously are less inclined to use their legal work or their religious materials for that purpose. But for cell fires and things like that, we try to limit, again, those types of items that could be used to create harm to themselves or others

Those, basically, I think, are the three reasons that we have this system And as I point out, the inmates primarily that we have in the LTSU, being a very small fraction of our overall general -- or total population of inmates in the system have proven through their

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previous behaviors that these types of measures, while seeming extreme in your case, actually give us a means or method to say, "You comply, you modify your behavior, and you can obtain these things, these privileges " You know, you have the ability through your own actions to be promoted, if you will, from a Level 2 inmate to a Level 1 inmate, and we do that every day.

We have a system where the Unit Management Team reviews each inmate's progress every 30 days. The Unit Management Team is made up of the unit manager, custody staff, psych staff, nursing staff.

And we try to give and provide the inmate every opportunity to progress through this system and to be able to obtain these privileges.

We're very limited, as I pointed out, in what we can and cannot deny or give to an inmate, and these are some of the items that we feel are legitimate as incentives for inmate growth.

Q. With respect to the physical plant itself, other than the law library, are there any other rooms that would be available for an

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inmate to read a newspaper that he's ordered or a magazine?
A. Of course, if the inmate was authorized to have either of those items, he could certainly do it in his cell.
Q. Assuming he wasn't authorized, assuming that we're living in this same world, and then I could create a reading room where an officer removes a newspaper from either the personal property box or keeps it at the desk or whatever and then walks the inmate into this room, hands him the newspaper, gives the inmate an hour to read the newspaper or the magazine, is there any physical place in the LTSU Unit that could serve as a reading area?
A. No, not that I know of, other than the mini law library. I think that the point here is that a Level 2 inmate, based on his history and behavior -- of course, this is the most restrictive unit in the State with regard to movement, inmate movement.
Only one inmate's allowed out of his cell at a time under the escort of two-- officers. They are in hand and leg restraints in many cases and with the use of a tether.

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So, again, the privilege of being able to read a newspaper or a magazine is one that we view should be an earned privilege. And through an inmate's behavior, they can earn their right to have those items in his cell and read them at his leisure.
Q. Are phone calls in the unit made -- are the phones placed in the inmate's cell, or does the inmate leave his cell to make that phone call?
A. There are inmate-monitored -- or monitored telephones on the unit where an inmate would be brought out of his cell. There is also inmate telephone calls made from the counselor's desk, at which time, of course, they would be out of their cell and in the counselor's office.
Q. They are also taken out of their cells I think three times a week for showers?
A. That's correct.
Q. And they're also taken out of their cells, each inmate, assuming that they want to go --
A. Five times a week.
Q. -- five times a week for exercise?
A. Correct.

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Q. We talked about books earlier. Books are brought into the unit from the law library and given to --
A. From the regular library.
Q. I'm sorry. From the regular prison library. And those, as I understood it, those are given to level --
A. All levels, yes.
Q. So the weapons that you talked about that could be made from a newspaper could be made from paper taken from a book?
A. Well, the only books that are allowed on the unit are paperback books that are, of course, small in nature.
A newspaper can be rolled into a fine tube. It can be used to fish other items from other cells out in the common pod area. It could be rolled to -- actually made into a-- spear. Some inmates are very creative in the things they can do with these materials.
Q. Can this spear actually puncture skin or something?
A. You could poke out someone's eye, certainly.
Q. You say a soft cover. An inmate

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couldn't put that together and --
A. Much less likely.
Q. And that's because?
A. Because of the size of the item.
Q. I know you talked about the LTSU as essentially being the worst of the worst. Would that be a fair way of putting it?
A. Yes.
Q. But there are some very violent inmates in regular Administrative Custody Units at the prison, too. Is that not so?
A. That's true.
Q. Inmates in the Special Management Units can be extremely violent and creative as well in terms of using paper to manufacture weapons or to start a cell fire or to heave feces with?
A. I would say they have the talent to do that. But when they would demonstrate the proclivity for that behavior, they probably would be on their way to the LTSU.
Q. In the LTSU, are there feces heavers currently?
A. It's a cyclic kind of a thing, you know. There'll tend to be a rash of that type

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of behavior, and then it will die off for a while, and it may start again, but it's not constant There's only, I would say -- it's certainly not all inmates either There are a handful that participate in that.
Q Those inmates who heave or are heaving not with newspapers or magazines, they're heaving with their hands; aren't they?
A I would say there's any number of ways they do it Oftentimes it's with the cups that they're given for their drinks, things like that, any type of container, or, as I say, a piece of a paper or whatever wrapped up that they can use to give a little leverage and fling the materials
Q They're allowed to have socks? They wear socks in the unit?
A Sure.
Q And they can heave feces with their socks?
A Well, what I'm getting at is the materials that -- when you have a magazine that has a little bit of rigidity to it which gives you some additional thrust, if you will, whereas a sock is fairly, you know --

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Q But a book, an entire book can give you that same sort of thrust; couldn't it?
A Uh-huh (Witness nodding head.)
Q In terms of cell fires, are inmates permitted to have blankets in their cells?
A Yes
Q Are those blankets fire retardant? Can they start a fire with a blanket if they lit the blanket?
A I imagine they could.
Q They have jump suits-on that are flammable as well, don't they?
A Yes
Q Do they have linen on their beds?
A Yes
Q Bed sheets?
A Yes
Q Are they given writing paper at all?
A Yes.
Q How much of that are they allowed to have in their cell?
A Generally, ten sheets at a time.
Q Are they permitted to have matches in their cell?
A No.

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Q But some of them do find ways of getting matches?
A Yes, they do
Q Have there been any cell fires in the LTSU over the past six months?
A Yes.
Q Approximately how many?
A Within the last six months, I would say no more than two or three.
Q Do you know what the nature of those -- how those fires started, what was used to --
A Paper products generally are the way it's first ignited
Q Is it their writing paper?
A I don't know
Q Do you know of any instance where an inmate who had a magazine in his cell who would have been a Level 1, or a newspaper, used those items for fire?
A No.
Q Wouldn't it be fair to say that if an inmate wants to start a fire, he could start a fire using writing paper in combination with a blanket or in combination with clothing or linen, bedding materials? He could do that;

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couldn't he?
A Yes
Q If he wants to throw feces, he could use a cup for that; true?
A Yes.
Q Or if he wants to throw urine, he can use his cup to throw the urine?
A Yes.
Q Would you say that it would be fair to say that you have identified -- by you, I mean the officials -- on the basis of having these inmates in a cell block, you fairly well know those inmates who are prone to use their personal property in a violent sort of way, at least some of the inmates who -- and I know you can't be sure about these things, but there are at least some inmates in there who the officials would say, "Well, he probably would be somebody who would not use his newspaper, not use his magazine to do violence with"?
A I think that's a fair statement, although I also would tell you that some of them are totally predictable.
Q I understand that. Assuming that inmates were allowed to have -- and I'm just

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assuming for the sake of this deposition, that there were a change of policy. An inmate that was on Level 2 was permitted to receive a newspaper and read it between the hours of 9 o'clock and 12 o'clock in the afternoon and then had to return the newspaper

That would pretty much address the issue of whether they're using newspapers to hide between the pages some item of contraband, wouldn't it? I mean, that newspaper could be checked when the officer gets it back and even thrown out?

A. True, but it wouldn't address the primary reason for the denial of these types of privileges, which is just that so it functions as a privilege, and, again, back to the rehabilitative or modification of the negative behaviors purpose and having a privilege and using it as a reward for positive conduct

Q. Inmates on the LTSU Unit eat their meals inside the cells?

A. They do

Q. Would the meals be passed through the pie hole?

A. Correct. Correct.

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Q. Is that on any sort of tray that they get their meals?

A. Yes

Q. What is the tray made of?

A. It's a hard plastic composition. It's a clear plastic material.

Q. When they pass through, does an inmate keep the tray as long as he's eating, and then he returns the tray?

A. That's correct.

Q. Along with --

A. With the lid

Q. When an inmate is removed from the cell for any purpose, whether to go out to recreation or to consult with somebody in the prison hospital or for any other reason, to make a phone call, do they have to be -- are their hands shackled?

A. Yes.

Q. That's done by putting their hands behind their back?

A. Yes.

Q. Through the pie hole?

A. Yes.

Q. So they're shackled behind their

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back?

A. Yes

Q. What about their legs? Are those shackled?

A. Generally not on the unit itself, but depending upon -- if, for instance, the inmate has exhibited some assaultive behavior, yeah

Q. If I understand, if an inmate either recently exhibited assaultive behavior or has been historically somebody when he's removed from his cell is problematic, that inmate in a particular circumstance --

A. Right. Yes.

MR. KRAKOFF: I think that completes my examination, if I may have three seconds.

(Whereupon, a brief recess was taken.)

MR. KRAKOFF: That will conclude the deposition unless there is something --

THE WITNESS: Just to give you an idea, this is the August schedule for A-3 as far as the library goes. That's how it works up there. This is the listing of magazines that are --

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MR. MERICLI: We'll make these 22 and 23.

MR. KRAKOFF: 22 will be the August 2002 calendar dealing with book deliveries on the unit, and 23 will be -- it's two-sided. It's a document that reflects magazines that are in the main prison library

(Whereupon, the documents were marked as Plaintiff's Exhibit Nos. 22 and 23 for identification.)

MR. KRAKOFF: That's fine. That's all. I appreciate it

(Whereupon, signature was waived.)

(Whereupon, this deposition was concluded at 1:01 p.m.)

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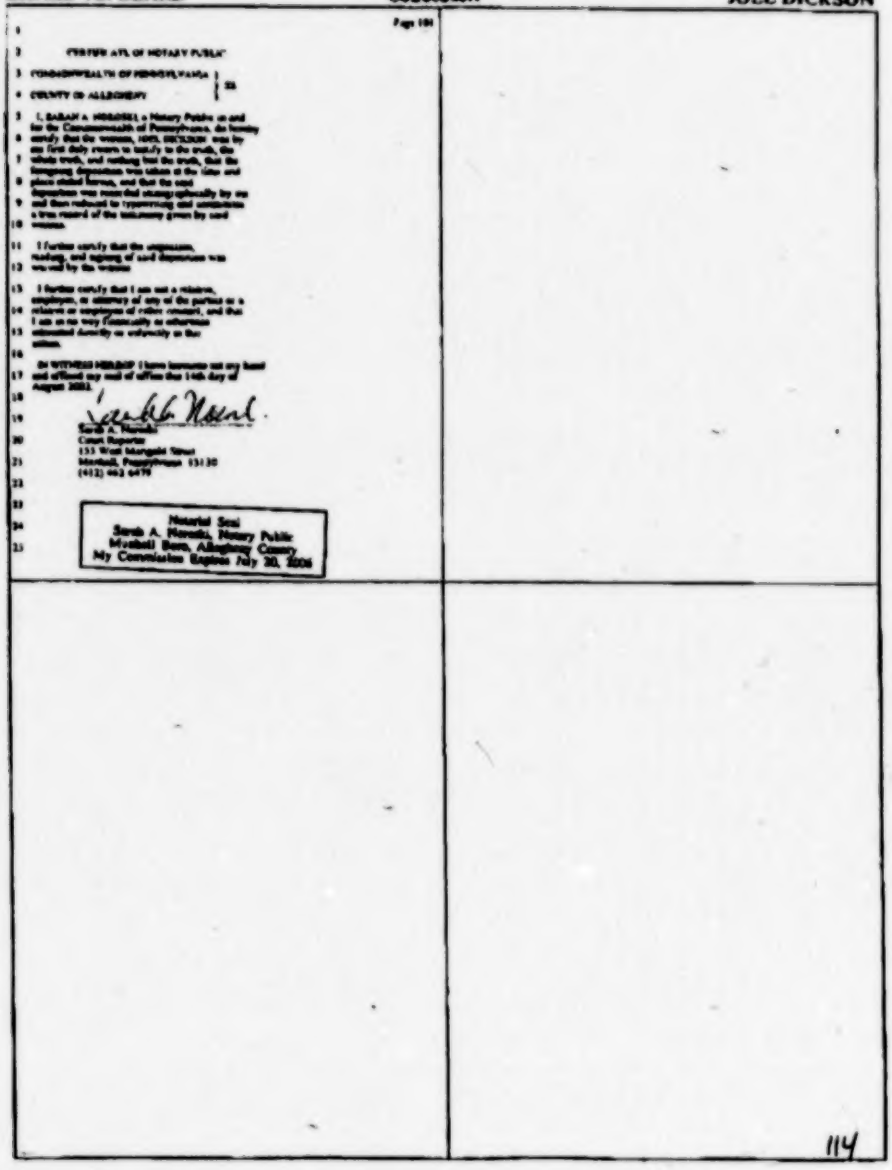

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CERTIFICATE OF NOTARY PUBLIC

COMMONWEALTH OF PENNSYLVANIA }
} SS
COUNTY OF ALLEGHENY }

I, SARAH A. NOROSKI, a Notary Public in and for the Commonwealth of Pennsylvania, do hereby certify that the witness, JOEL DICKSON, was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth, that the foregoing deposition was taken at the time and place stated herein, and that the said deposition was recorded stenographically by me and then reduced to typewriting and constitutes a true record of the testimony given by said witness.

I further certify that the signature, reading, and signing of said deposition was not waived by the witness.

I further certify that I am not a relative, employee, or attorney of any of the parties or a relative or employee of either counsel, and that I am in no way financially or otherwise interested directly or indirectly in the action.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my seal of office this 14th day of August 2002.

Sarah A. Noroski
Court Reporter
133 West Market Street
Marshall, Pennsylvania 15130
(412) 462-6479

Notarial Seal
Sarah A. Noroski, Notary Public
Marshall Boro, Allegheny County
My Commission Expires July 30, 2006

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MAG APPEAL
CLOSED

U.S. District Court
Western District of Pennsylvania (Pittsburgh)

CIVIL DOCKET FOR CASE #: 01-CV-1956

ANKS v. BEARD — Filed: 10/18/01
signed to: Judge Terrence F. McVerry
Referred to: Mag. Judge Robert C. Mitchell
mand: $0,000 — Nature of Suit: 555
ead Docket: None — Jurisdiction: Federal Question
in other court: None

ause: 42:1983 Prisoner Civil Rights

NALD BANKS, for himself and n behalf of all similarly tuated prisoners who are nfined or will be confined n Long Term Segregation Units f State prisons located in Western Judicial District Pennsylvania plaintiff	Jere Krakoff (412) 232-0276 [COR LD NTC] 1705 Allegheny Building Pittsburgh, PA 15219 (412) 232-0276
v.	
FREY BEARD, in his official apacity as Secretary of the nsylvania Department of rections defendant	Kemal Alexander Mericli [COR LD NTC] Office of the Attorney General Civil Litigation Section 564 Forbes Avenue 6th Floor, Manor Complex Pittsburgh, PA 15219 (412) 565-7680

Proceedings include all events. MAG APPEAL
2:01cv1956 BANKS v. BEARD CLOSED

/18/01	1	COMPLAINT Filing Fee $ 150.00 Receipt # 349 (jsp) [Entry date 10/18/01]
/18/01	--	CASE REFERRED to Mag. Judge Kenneth J. Benson (jsp) [Entry date 10/18/01]
10/02	27	MEMORANDUM ORDER denying [20-1] motion for Summary Judgment, granting [16-1] motion for Summary Judgment, adopting [25-1] report and recommendations; FURTHER ORDERED that final judgment of this Court is entered pursuant to Rule 58 of the FRCP. (signed by Judge Terrence F. McVerry on 1/10/03) CM all parties of record. NOTICE MAILED (plh) [Entry date 01/13/03]
11/02	2	ANSWER to Complaint by JEFFREY BEARD (Attorney Kemal Alexander Mericli) (jsp) [Entry date 01/11/02]
14/02	3	MOTION by RONALD BANKS for Class Certification with Proposed Order. (plh) [Entry date 01/14/02]
28/02	4	ORDER, set Plaintiffs Pretrial Statements deadline for 2/20/02, set Defendants Pretrial Statements deadline for 3/20/02 (signed by Mag. Judge Kenneth J. Benson on 1/28/02) CM all parties of record. (cw) [Entry date 01/29/02]
/5/02	5	ORDER vacating [4-1] order set Plaintiffs Pretrial Statements deadline for 2/20/02, vacating [4-2] relief set Defendants Pretrial Statements deadline for 3/20/02, vacating [4-3] relief, set Case Management Conference for 10:00 2/14/02 by Telephone. (signed by Mag. Judge Kenneth J. Benson on 2/5/02) CM all parties of record. (plh) [Entry date 02/05/02]
19/02	6	ORDER, reset Case Management Conference by Telephone for 10:30 2/20/02. (signed by Mag. Judge Kenneth J. Benson on 2/19/02) CM parties of record. (plh) [Entry date 02/19/02]
2/02	7	TELEPHONE Case Management Conference held on 2/20/02 before Mag. Judge Kenneth J. Benson [Reporter: none] (plh) [Entry date 02/22/02]
2/02	8	CASE MANAGEMENT ORDER setting Discovery cutoff on 6/20/02 ; Status Conference set for 10:15 6/19/02. (signed by Mag. Judge Kenneth J. Benson on 2/22/02) CM all parties of record. (plh) [Entry date 02/22/02]
/22/02	9	REPORT AND RECOMMENDATION of Mag. Judge Kenneth J. Benson signed on 2/22/02 Recommending that [3-1] motion for Class Certification be granted, and that a class of pltfs be certified in this case as more fully described below; The parties have 10 days from the date of service to file objections to this Report and Recommendation. (plh) [Entry date 02/22/02]

cket as of March 18, 2003 11:40 am Page 3

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roceedings include all events. MAG APPEAL
01cv1956 BANKS v. BEARD CLOSED

/22/02 10 MEMORANDUM and ORDER granting [3-1] motion for Class Certification, as current and future Phase 2 Long Term Segregation inmates who are confined or will be confined in Pennsylvania Department of Corrections prisons located within the venue of the Western Federal Judicial District of Pennsylvania; adopting [9-1] report and recommendations. (signed by Judge Robert J. Cindrich on 3/22/02) CM all parties of record. (plh) [Entry date 03/25/02]

/19/02 11 Status Conference held before Mag. Judge Kenneth J. Benson [Reporter: none] (plh) [Entry date 06/19/02]

/19/02 12 ORDER, set Discovery deadline to 8/3/02, set Telephone Status Conference for 9:30 8/5/02. (signed by Mag. Judge Kenneth J. Benson on 6/19/02) CM all parties of record. (plh) [Entry date 06/19/02]

/7/02 13 ORDER, set Motion Filing deadline to 9/19/02, Reply to Response to Motion on or before 10/21/02. (signed by Mag. Judge Kenneth J. Benson on 8/7/02) CM all parties of record. (plh) [Entry date 08/08/02]

7/02 14 Tele-conference held on 8/5/02 before Mag. Judge Kenneth J. Benson [Reporter: none] (plh) [Entry date 08/08/02]

12/02 15 ORDER REFERRING CASE to Mag. Judge Robert C. Mitchell (signed by Judge D. B. Smith on 9/12/02) CM all parties of record. (jsp) [Entry date 09/13/02]

20/02 16 MOTION by JEFFREY BEARD for Summary Judgment with Proposed Order. (plh) [Entry date 09/20/02]

20/02 17 STATEMENT OF MATERIAL FACTS by JEFFREY BEARD (plh) [Entry date 09/20/02]

20/02 18 BRIEF by JEFFREY BEARD in support of [16-1] motion for Summary Judgment by JEFFREY BEARD (plh) [Entry date 09/20/02]

20/02 19 APPENDIX to [16-1] motion for Summary Judgment by JEFFREY BEARD (plh) [Entry date 09/20/02]

27/02 20 MOTION by RONALD BANKS for Summary Judgment with Proposed Order. (plh) [Entry date 09/27/02]

/27/02 21 BRIEF by RONALD BANKS in support of [20-1] motion for Summary Judgment by RONALD BANKS (plh) [Entry date 09/27/02]

/27/02 22 APPENDIX to [21-1] support brief by RONALD BANKS (plh) [Entry date 09/27/02]

roceedings include all events. MAG APPEAL
01cv1956 BANKS v. BEARD CLOSED

0/3/02	23	RESPONSE by RONALD BANKS to [16-1] motion for Summary Judgment by JEFFREY BEARD (plh) [Entry date 10/03/02]
/4/02	24	ORDER that the Clerk of Court reassign this case to the Hon. Judge Terrence F. McVerry. (signed by Judge Robert J. Cindrich on 10/4/02) CM all parties of record. (plh) [Entry date 10/04/02]
0/4/02	--	CASE reassigned to Judge Terrence F. McVerry (plh) [Entry date 10/04/02]
1/15/02	25	REPORT AND RECOMMENDATION of Mag. Judge Robert C. Mitchell signed on 11/15/02 Recommending that [20-1] motion for Summary Judgment be denied, [16-1] motion for Summary Judgment be granted ; The parties have 10 days from the date of service to file objections to this Report and Recommendation. (plh) [Entry date 11/15/02]
1/26/02	26	OBJECTION by RONALD BANKS to [25-1] report and recommendations (plh) [Entry date 11/26/02]
/10/03	--	Case closed (plh) [Entry date 01/13/03]
1/10/03	27	ORDER granting [16-1] motion for Summary Judgment denying [20-1] motion for Summary Judgment and Final Judgment is Entered by the Court. (signed by Judge Terrence F. McVerry on 1/10/03) CM all parties of record. (aen) [Entry date 01/23/03]
/23/03	28	NOTICE OF APPEAL by RONALD BANKS from order dated 1/10/03 FILING FEE $ 105. RECEIPT # 2011 TPO issued. (pt) [Entry date 01/23/03]
/23/03	--	Certified copy of Notice of Appeal [28-1] appeal by RONALD BANKS , certified copy of docket, certified copy of order dated 1/10/03 mailed to USCA; copy of Notice of Appeal and information sheet to counsel of record, M.J. Mitchell and Judge McVerry. Copy of information sheet to appellant. (pt) [Entry date 01/23/03]
/27/03	29	Transcript Purchase order re: [28-1] appeal by RONALD BANKS advising that an transcript is not needed for appeal purposes. (plh) [Entry date 01/27/03]
/27/03	--	Record complete for Appeal purposes, certified copy of docket entries forwarded to USCA. (plh) [Entry date 01/27/03]
/31/03	--	RECEIPT from USCA of receiving docket entries on 1/29/03. (plh) [Entry date 01/31/03]
/31/03	--	USCA Case Number Re: [28-1] appeal by RONALD BANKS USCA NUMBER: 03-1245 (plh) [Entry date 01/31/03]

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RECEIVED
NOV 18 2002
BY:

RONALD BANKS,
Plaintiff,

vs

JEFFREY BEARD,
Defendant

Civil Action No 01-1956

REPORT AND RECOMMENDATION

I. Recommendation

It is respectfully recommended that the motion for summary judgment submitted on behalf of defendant (Docket No. 16) be granted, and plaintiffs' motion for summary judgment (Docket No 20) be denied.

II. Report

Presently before this Court for disposition are cross motions for summary judgment.

Plaintiff Ronald Banks commenced this action under 42 U.S.C. § 1983, on behalf of himself and other similarly situated prisoners alleging that defendant's policy denying certain segregated inmates access to newspapers, magazines and photographs is violative of their First Amendment rights.

The record demonstrates that the Department of Corrections has established a Long Term Segregation Unit ("LTSU") at the State Correctional Institution at Pittsburgh ("SCIP") to house inmates that are "the most incorrigible, the most difficult, problematic, and

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have demonstrated the most behavior conflicts "[1] The purpose of creating the LTSU is to ensure the safety and security of the Department and to promote behavioral changes in the inmates assigned there.[2] The LTSU population presently consists of approximately forty inmates and constitutes approximately one tenth of one percent of the entire prison population in the state system.[3] The LTSU is the most restrictive in the State and policy permits only one inmate out of his cell at a time who must then wear hand and leg restraints and must be escorted by two correctional officers.[4] Each inmate coming into the LTSU spends a minimum of ninety days on "Level 2" where they are prohibited from having newspapers, magazines or photographs in their cells.[5] Nor do Level 2 inmates have access to the prison library where newspapers and magazines subscribed to by the prison are held. Moreover, they may only receive news clippings in the mail if they have some connection to the inmate.[6] As such, any magazines, newspapers or photographs in the inmates possession when he is transferred to the LTSU are placed in storage and any such materials subsequently found in an inmates's possession are considered contraband

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1 Deposition of Deputy Superintendent Joel Dickson ("Dickson Depo."), pp. 25-26, 28, 92. A copy of Mr. Dickson's deposition transcript has been submitted by defendant as Appendix A (Docket No. 19).

2 Id. at 24-25.

3 Id. at 17, 25.

4 Id. at 89.

5 Id. at 18-19, 46-48, 68-70

6 Id. at 46-48.

and confiscated.[7] Indeed, the only reading material that Level 2 inmates are permitted to have are paperback books that they can order from the library.[8]

After the initial ninety-day period, correction officials review each inmate's progress every thirty days to determine whether their behavior warrants a promotion to Level 1 where the inmates are permitted to have an ordinary general circulation newspaper in their cell and up to five magazines that may be exchanged on a one-for-one basis.[9] Presently, approximately three of the thirty-nine inmates held in the LTSU are on Level 1.[10]

Deputy Superintendent Joel Dickson, who supervises the LTSU at SCIP, testified at his deposition that these prohibitions serve several penological purposes. First, it promotes behavior modification. Defendant's position is that by ameliorating the prohibitions for Level 1 inmates and virtually eliminating them for the general prison population, it encourages the most difficult prisoners to not only become integrated into the general population but, upon release, to be a more productive citizens. Second, according to Deputy Dickson, the policy promotes security as the less property these inmates have in their cells the more difficult it is for them to conceal contraband. As well, it minimizes the materials available to these inmates that can be used to create harm either to themselves or to others.[11] In this regard, Dickson testified that

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[7] Id. at 48, 50-51, 71.

[8] Id. at 91.

[9] Id. at 20, 55-56, 88

[10] Id. at 17

[11] Id. at 85-88.

newspapers and magazines can be rolled up and used as blow guns and spears, used to fling feces and urine at the guards, or used as tinder for cell fires.[12]

Plaintiff Banks filed the instant complaint on October 18, 2001, on behalf of himself and other similarly situated prisoners alleging that defendant's policy prohibiting Level 2 inmates from maintaining magazines, newspapers and photographs in their cells violates the free speech component of the First Amendment to the United States Constitution. Plaintiff seeks equitable and declaratory relief as well as the issuance of preliminary and permanent injunctions. A Motion for Class Certification was also filed by plaintiff on January 14, 2002, and, unopposed by defendant, was granted on March 22, 2002.[13]

The parties have now filed cross motions for summary judgment. Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R.Civ. P. 56(c). See Marzano v. Computer Science Corp., 91 F.3d 497, 501 (3d Cir. 1996). In deciding a motion for summary judgment the court must view all inferences in a light most favorable to the non-moving party. Id., citing Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994). The non-moving party, however, may not rely on bare assertions, conclusory allegations or mere suspicions to support its claim but must demonstrate by record evidence the meritorious nature of the claim. Orsatti v. New Jersey, 71 F.3d 480, 484 (3d Cir. 1995).

The law is not in dispute. In an effort to balance an inmate's right to maintain his or her Constitutional protections within the prison setting and the necessity of limiting those

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[12] Id. at 85-88, 91-92.

[13] See Docket Nos. 9 and10.

rights by prison officials in order to accommodate the demands of managing a prison, the United States Supreme Court has held that a prison policy that intrudes on an inmate's constitutional rights will nevertheless be upheld "if it is reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987)("Turner"). See Fraise v. Terhune, 283 F.3d 506, 515 (3d Cir. 2002)("Fraise"). As reiterated by the Court of Appeals for the Third Circuit, Turner requires a court to weigh four factors in determining whether this standard has been met:

> [F]irst, whether the regulation bears a "valid, rational connection" to a legitimate and neutral governmental objective; second, whether prisoners have alternate ways of exercising the circumscribed right; third, whether accommodating the right would have a deleterious impact on other inmates, guards, and the allocation of prison resources generally; and fourth, whether alternatives exist that "fully accommodate[] the prisoner's rights at a de minimus cost to valid penological interests."

Fraise v. Terhune, 283 F.3d at 513-14, quoting Turner v. Safley, 482 U.S. at 91. Although these factors are merely guidelines by which to evaluate the reasonableness of prison regulations "'the first fact looms especially large,' because it 'tends to encompass the remaining factors, and some of the criteria are apparently necessary conditions.'" Waterman v. Farmer, 183 F.3d 208, 213-14 (3d Cir. 1999), quoting Amatel v. Reno, 156 F.3d 192, 196 (D.C. Cir. 1998), cert. denied, 527 U.S. 1035 (1999). Moreover, where the regulation at issue implicates prison security, particular deference should be accorded to prison authorities. Fraise v. Terhune, 283 F.3d at 516, relying on Turner v. Safley, 482 U.S. at 84-85.

Here, as previously discussed, defendant contends that the policies at issue serve the penological interests of furthering prison security and encouraging compliant behavior in

particularly disobedient and rebellious inmates.[14] Plaintiffs do not appear to challenge the legitimacy of these governmental objectives but rather contend that there is no rational connection between these objectives and the policy of prohibiting Level 2 inmates to have newspapers, magazines and photographs in their cells.[15]

Specifically, with respect to the prison's interest in encouraging compliant behavior, plaintiffs argue that rehabilitative goals are only furthered by maintaining contact with the outside world and that isolating these inmates from such contact is therefore counter productive. As well, plaintiffs contend that because the LTSU invokes other compelling rehabilitation incentives that the additional inducements of prohibiting newspapers, magazines and photographs are only marginally worthwhile.

The difficulty with plaintiffs arguments, in our view, is that having newspapers and magazines available to them while in the general population or the Special Management Unit apparently did nothing to further their rehabilitation or they wouldn't now be in the LTSU. Indeed, plaintiffs are in the LTSU because efforts in other units failed thus already proving

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[14] We note here that defendant does not dispute that the policies at issue infringe on plaintiffs' First Amendment rights in the first instance but argue that they should nevertheless be upheld because they are reasonably related to legitimate penological interests.

[15] Although defendant has challenged whether plaintiffs have exhausted administrative review of the policy against photographs, plaintiffs have submitted documentation which suggests that they have. See Plaintiffs' Reply to Defendant's Motion for Summary Judgment (Docket No. 23). As such the issue is properly considered by the Court. See Ahmed v. Dragovich, 297 F.3d 201, 209 n.9 (3d Cir. 2002); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 534-37 (7th Cir. 1999).

themselves to be the most incorrigible, the most difficult, and the most problematic prisoners.[16] Having consequently been transferred to the LTSU, it seems not only rational to impose more restrictive conditions in an effort to encourage compliant behavior but imperative to the success of the LTSU

Plaintiffs also argue that defendant's security objectives are not rationally related to the prohibition of newspapers, magazines and photographs since there are other means available to these prisoners to start fires, hurl waste, conceal contraband and create weapons. The fact that the policy does not completely eliminate the opportunity for these inmates to create security concerns, however, does not, in our view, render the policy unrelated to those concerns or negate the prison's interest in minimizing the prisoners' access to materials that are most easily and commonly used as weapons or to set fires and fling feces. Indeed, it appears less likely that an inmate would use their bedding, clothes, legal and religious papers to start fires or fling feces than the daily newspaper.

Moreover, of primary concern is the use of the prohibited items as blow guns and spears for which magazines and newspapers, given their ability to be rolled, are ideal.[17] Plaintiffs nevertheless argue that the relationship between the policy and this objective is too tenuous to pass constitutional muster as evidenced by the fact that other dangerous and problematic inmates housed in other segregated units do not have the same restrictions imposed upon them. While it may be true that prisoners in the Special Management Unit and Administrative Custody enjoy some access to newspapers and magazines, Deputy Superintendent Dickson testified that should

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[16] See Dickson Depo. at 25.

[17] Dickson Depo. at 91, 93.

they show a propensity to use them as weapons or to set fires and fling feces that they too "would be on their way to the LTSU "[18] Thus, it appears that the inmates in the other segregated units do not present the same security concerns as those in the LTSU and the fact that they have access to the materials utilized by LTSU inmates as weapons does not serve to sever the connection between the prohibition at issue and prison security

Because the record appears to support a finding that the policy denying Level 2 inmates access to newspapers, magazines and photographs bears a valid and rational connection to legitimate prison objectives, the first Turner factor appears to weigh in defendant's favor.

Similarly, it appears clear that the second factor – whether these inmates have an alternative way of exercising their constitutionally protected rights – also weighs in defendant's favor. Significantly, the prison's policy denying plaintiffs access to the cited articles is not a blanket prohibition. To the contrary, each of these prisoners has the option of modifying their behavior and being promoted to a less restricted environment where access to newspapers, magazines and photographs may be enjoyed. Moreover, it appears that Level 2 inmates are able, albeit on a limited basis, to visit with loved ones and are able to carry on a correspondence.[19]

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[18] Dickson Depo. at 92.

[19] As well, although plaintiffs have stated that there is no opportunity to see their minor children and other relatives because the Department of Corrections prohibits minors from visiting Level 2 inmates, see Plaintiffs' Brief in Support of Their Motion for Summary Judgment, p. 16 (Docket No. 21), the LTSU Rules and Regulations, which have been provided by plaintiffs, states that the number of visitors during any given time is two which may include one child under the age of 18 and that "[t]he Shift Commander has the discretion to permit additional visitors such as small children and/or infants on a case-by-case basis." See Appendix to

(continued...)

The third factor appears to weigh in favor of the prison's policy as well. This prong of the Turner test obligates the court to consider the effect that accommodating the right would have on fellow inmates, prison staff and on the allocation of prison resources. Fraise v. Terhune, 283 F.3d at 520; DeHart v. Horn, 227 F.3d 47, 57 (3d Cir. 2000).

In Fraise v. Terhune, supra, a group of inmates brought suit alleging that the prison policy which authorizes prison officials to designate and transfer core members of "security threat groups" was violative of the Free Exercise Clause of the First Amendment as well as the Equal Protection and Due Process Clauses. As in the present case, the prison's stated penological objective for justifying the policy was prison security. In addressing the third Turner factor, the Court of Appeals for the Third Circuit quoted the Fourth Circuit's opinion in In re Long Term Admin. Segregation of Inmates Designated as Five Percenters, 174 F.3d 464, 470 (4th Cir.), cert. denied, 528 U.S. 874 (1999), which in turn relied upon Turner, stating that:

> Prison administration often involves tradeoffs. In the closed environment of a prison, greater liberties for some may mean increased danger and intimidation for others. Because increased freedom for the Five Percenters would come "only at the cost of significant less liberty and safety for everyone else, guard and other prisoners alike," we are particularly reluctant to interfere with the judgment of the [prison officials] in this case.

Fraise v. Terhune, 283 F.3d at 520. Noting that under Turner a highly deferential standard should be applied when there is a "ripple effect" on others, the Fraise Court found that the fourth prong had been satisfied. Id.

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[9] (...continued)
Plaintiffs' Brief in Support of Their Motion For Summary Judgment, p. 23 (Docket No. 22).

Here, having already found ample evidence to support a finding that access to newspapers, magazines and photographs presents a threat to the security of both guards and other prisoners in the LTSU, it appears that accommodating plaintiffs' asserted right would have the very "ripple effect" referred to in Turner and Fraise. Accordingly, the prison officials are entitled to a high degree of deference and, under Fraise, the third factor also appears to weigh in defendant's favor.

Nor does plaintiffs' renewed argument that because inmates in other segregated units have access to newspapers and magazines without negative impact compel a different result. Indeed, it is not the mere presence of the magazines and newspapers that create the security concerns but what these particular inmates have chosen to do with them. The fact that other segregated inmates have not created the same security concerns while in possession of newspapers and magazines is one reason why they are in those units and not in the LTSU. Indeed, it appears that the same fate awaits any of the inmates confined in any of the other segregation units that cannot maintain an acceptable level of behavior. Conversely, plaintiffs are being deprived of newspapers and magazines because they have already proven themselves to be unwilling to behave in a responsible manner which precipitated their transfer to the LTSU in the first instance.

In addition, as argued by defendant, absent allowing plaintiffs access to the prohibited materials, which has proven unsuccessful, the only alternative appears to be individually escorting Level 2 prisoners to the mini library which is the only available site in the LTSU for reading newspapers. Such an accommodation, however, would not only intensify security concerns by increasing the amount of inmate movement but it would seemingly place a

formidable burden on the LTSU staff. See Allah v. Al-Hafeez, 208 F.Supp.2d 520, 530 (E.D. Pa. 2002)(Finding that the third Turner factor weighed in defendants' favor where plaintiff's behavior created a security concern and that accommodating his attendance at religious services would require more monitoring thereby straining prison resources and affecting the prison staff and other inmates.)

Finally, the court must evaluate whether there are alternatives to the policy that would impose only a de minimis cost to valid penological interests. Fraise v. Terhune, 283 F.3d at 513-514.

Plaintiffs suggest that an alternative would be to establish a reading period during which guards would deliver newspapers and magazines to each inmate in their respective cells and retrieve them at the end of the period. Plaintiffs argue that the number of publications that each inmate could have in his cell at one time could be limited as well as the number of days each week that the reading materials would be distributed.

We fail to see, however, how having a designated reading period would prevent the Level 2 inmates from using the reading material provided to them to start fires, fling feces or create weapons, as they have shown a willingness to do. Indeed, it appears that in order to give effect to plaintiffs' proposed alternative a guard would be required to monitor each cell during the reading period thus impacting not only the guards and other inmates but prison resources as well. Moreover, implementing plaintiffs' suggestion would not be without sacrifice to the prison's behavioral modification goals. It therefore appears that the cost of plaintiffs' proposed alternative is not de minimis and the fourth consideration set forth in Turner also appears to weigh in defendant's favor. See Fraise v. Terhune, 283 F.3d at 521, quoting Turner, 482 U.S. at

91 ("We reiterate that our inquiry is not whether the state could have adopted a less restrictive alternative but rather it could have adopted an alternative that imposed only 'de minimis cost to legitimate penological interests '")

Because all of the factors set forth in Turner appear to weigh in defendant's favor, the LTSU's policy prohibiting access to newspapers, magazines and photographs appears to be reasonably related to legitimate penological interests and, thus, is properly upheld notwithstanding its intrusion on plaintiffs' Constitutional rights.

For these reasons, it is recommended that the motion for summary judgment submitted on behalf of defendant (Docket No 16) be granted, and plaintiffs' motion for summary judgment (Docket No. 20) be denied.

Within ten (10) days of being served with a copy, any party may serve and file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

Respectfully submitted,

Robert C. Mitchell

ROBERT C. MITCHELL,
United States Magistrate Judge

Dated: November 19, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD BANKS, for himself and on behalf of all similarly situated prisoners who are confined or will be confined in Long Term Segregation Units of State prisons located in the Western Judicial District of Pennsylvania,	)	
Plaintiffs	)	
v.	)	Civil Action No. 01-1956
JEFFREY BEARD, in his official capacity as Secretary of the Pennsylvania Department of Corrections,	)	
Defendant.	)	

MEMORANDUM ORDER

AND NOW, this 10th day of January, 2003, after the plaintiff, Ronald Banks, filed an action in the above-captioned case, and after cross motions for summary judgment were submitted by the parties, and after a Report and Recommendation was filed by United States Magistrate Judge Robert C. Mitchell (*Document No. 25*) granting the parties ten days after being served with a copy to file written objections thereto, and upon consideration of the objections filed by plaintiff (*Document No. 26*), which the Court notes were virtually identical to the arguments made by plaintiff in his brief in support of summary judgment and said arguments were previously given due consideration by the Magistrate Judge, and upon independent review of the motions and the record, and upon consideration of the Magistrate Judge's Report and Recommendation, which is adopted as the opinion of this Court,

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BY:

It is **ORDERED, ADJUDGED, AND DECREED** that defendant's motion for summary judgment (*Document No. 16*) is **GRANTED** and plaintiff's motion for summary judgment (*Document No 20*) is **DENIED.**

It is further **ORDERED** that final judgment of this Court is entered pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Terrence F. McVerry, Judge
United States District Court

cc: Jere Krakoff, Esquire
1705 Allegheny Building
Pittsburgh, PA 15219

Kemal Alexander Mericli, Esquire
Office of the Attorney General
Civil Litigation Section
564 Forbes Avenue
6th Floor, Manor Complex
Pittsburgh, PA 15219

Jere Krakoff
1705 Allegheny Building
Pittsburgh, PA 15219

CLERK'S OFFICE
United States District Court
for Western Pennsylvania

Civil Action No. 2:01-cv-01956
BANKS v. BEARD

There was entered on the docket January 10, 2003, an order granting mary judgment to deft.

Robert Barth, CLERK

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JAN 14 2003
BY:

U.S Ct. of App. D.C Cir. Rule 36, 28 U S.C.A.

<C>
UNITED STATES CODE ANNOTATED
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
TITLE VII. GENERAL PROVISIONS
>>Rule 36. Decisions of the Court, Opinions and Abbreviated Dispositions

(a) Opinions of the Court.

(1) Policy. It is the policy of this court to publish opinions and explanatory memoranda that have general public interest.

(2) Published Opinions. An opinion, memorandum, or other statement explaining the basis for the court's action in issuing an order or judgment will be published if it meets one or more of the following criteria:

(A) with regard to a substantial issue it resolves, it is a case of first impression or the first case to present the issue in this court;

(B) it alters, modifies, or significantly clarifies a rule of law previously announced by the court;

(C) it calls attention to an existing rule of law that appears to have been generally overlooked;

(D) it criticizes or questions existing law,

(E) it resolves an apparent conflict in decisions within the circuit or creates a conflict with another circuit;

(F) it reverses a published agency or district court decision, or affirms a decision of the district court upon grounds different from those set forth in the district court's published opinion,

(G) it warrants publication in light of other factors that give it general public interest

All published opinions of the court, prior to issuance, will be circulated to all judges on the court; printed prior to release, unless otherwise ordered; and rendered by being filed with the clerk.

(b) Abbreviated Dispositions. The court may, while according full consideration to the issues, dispense with published opinions where the issues occasion no need therefor, and confine its action to such abbreviated

disposition as it may deem appropriate, e g., affirmance by order of a decision or judgment of a court or administrative agency, a judgment of affirmance or reversal, containing a notation of precedents or accompanied by a brief memorandum. If the parties have agreed to such disposition, they may so state in their briefs or may so stipulate at any time prior to decision. In any such case the court will promptly issue a judgment unless compelling reasons dictate otherwise

(c) Unpublished Opinions.

(1) An opinion, memorandum, or other statement explaining the basis for this court's action in issuing an order or judgment under subsection (b) above, which does not satisfy any of the criteria for publication set out in subsection (a) above, will nonetheless be circulated to all judges on the court prior to issuance. A copy of each such unpublished opinion, memorandum, or statement will be retained as part of the case file in the clerk's office and be publicly available there on the same basis as any published opinion.

(2) While unpublished orders and judgments may be cited to the court in accordance with Circuit Rule 28(c)(1)(B), a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition

(d) Motion to Publish. Any person may, by motion made within 30 days after judgment or, if a timely petition for rehearing is made, within 30 days after action thereon, request that an unpublished opinion be published. Motions filed out of time will not be considered unless good cause is shown Motions for publication must be based upon one or more of the criteria listed in subsection (a). Such motions are not favored and will be granted only for compelling reasons

<Federal Rules of Appellate Procedure also govern procedure in appeals to United States courts of appeals>

Amendments received to 07-31-05

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FILED
JAN 5 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 04-1739

IN THE

Supreme Court of the United States

JEFFREY BEARD,

Petitioner

v.

RONALD BANKS

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

LOUIS J. ROVELLI
Office of Attorney General
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Harrisburg, PA 17120
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Counsel of Record for Respondent

Petition for Certiorari Filed June 20, 2005
Petition for Certiorari Granted November 14, 2005

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DECISION UNDER REVIEW

Note: The decision of the Court of Appeals is reprinted in the appendix to the petition for certiorari at 1a.

U.S. District Court
Western District of Pennsylvania (Pittsburgh)
CIVIL DOCKET FOR CASE #:2:01-cv-01956-TFM-RCM

BANKS v. BEARD
Assigned to: Judge Terrence F. McVerry
Referred to: Mag. Judge Robert C. Mitchell
Demand: $0
Cause: 42:1983pr Prisoner Civil Rights

Date Filed: 10/18/2001
Jury Demand: None
Nature of Suite: 555 Prisoner Civil Rights (Prison Condition)
Jurisdiction: Federal Question

* * * * *

10/18/2001 1 COMPLAINT Filing Fee $150.00 Receipt #349 (jsp) (Entered: 10/18/2001)

10/18/2001 CASE REFERRED to Mag. Judge Kenneth J. Benson (jsp) (Entered: 10/18/2001)

01/10/2002 27 MEMORANDUM ORDER denying [20-1] motion for Summary Judgment, granting [16-1] motion for Summary Judgment, adopting [25-1) report and recommendation; FURTHER ORDERED that final judgment of this Court is entered pursuant to Rule 58 of the FRCP. (signed by Judge Terrence F. McVerry on 1/10/03) CM all parties of record. NOTICE MAILED (plh) (Entered: 01/13/2003)

01/11/2002 2 ANSWER to Complaint by JEFFREY BEARD (Attorney Kemal Alexander Mericli) (jsp) 9Entered: 01/11/2002)

01/14/2002 3 MOTION by RONALD BANKS for Class Certification with Proposed Order. (plh) (Entered: 01/14/2002)

01/28/2002 4 ORDER, set Plaintiffs Pretrial Statements deadline for 2/20/20, set Defendants Pretrial Statements deadline for 3/20/02 (signed by Mag. Judge Kenneth J. Benson on 1/28/02) CM all parties of record. (crw) (Entered: 01/29/2002)

02/05/2002 5 ORDER vacating [4-1] order set Plaintiffs Pretrial Statements deadline for 2/20/02, vacating [4-2] relief set Defendants Pretrial Statements deadline for 3/20/02, vacating [4-3] relief, set Case Management Conference for 10:00 2/14/02 by Telephone. (signed by Mag. Judge Kenneth J. Benson on 2/5/02) CM all parties of record. (plh) (Entered: 02/05/2002)

02/19/2002 6 ORDER, reset Case Management Conference by Telephone for 10:30 2/20/02. (signed by Mag. Judge Kenneth J. Benson on 2/19/02) CM parties of record. (plh) (Entered: 02/19/2002)

02/22/2002 7 TELEPHONE Case Management Conference held on 2/20/02 before Mag. Judge Kenneth J. Benson [Reporter: none] (plh) (Entered: 02/22/2002)

02/22/2002 8 CASE MANAGEMENT ORDER setting Discovery cutoff on 6/20/02; Status Conference set for 10:15 6/19/02. (signed by Mag. Judge Kenneth J. Benson on 2/22/02) CM all parties of record. (plh) (Entered: 02/22/2002)

02/22/2002 9 REPORT AND RECOMMENDATION of Mag. Judge Kenneth J. Benson signed on 2/22/02 Recommending that [3-1] motion for Class Certification be granted, and that a class of pltfs be certified in this case as more fully described below; The parties have 10

days from the date of service to file objections to this Report and Recommendation. (plh) (Entered: 02/22/2002)

03/22/2002 10 MEMORANDUM and ORDER granting [3-1] motion for Class Certification, as current and future Phase 2 Long Term Segregation inmates who are confined or will be confined in Pennsylvania Department of Corrections prisons located within the venue of the Western Federal Judicial District of Pennsylvania; adopting [9-1] report and recommendations. (signed by Judge Robert J. Cindrich on 3/22/02) CM all parties of record. (plh) (Entered: 03/25/2002)

06/19/2002 11 Status Conference held before Mag. Judge Kenneth J. Benson [Reporter: none] (plh) (Entered: 06/19/2002)

06/19/2002 12 ORDER, set Discovery deadline to 8/3/02, set Telephone Status Conference for 9:30 8/5/02. (signed by Mag. Judge Kenneth J. Benson on 6/19/02) CM all parties of record. (plh) (Entered: 06/19/2002)

08/07/2002 13 ORDER, set Motion Filing deadline to 9/19/02, Reply to Response to Motion on or before 10/21/02. (singed by Mag. Judge Kenneth J. Benson on 8/7/02) CM all parties of record. (plh) (Entered: 08/08/2002)

08/07/2002 14 Tele-conference held on 8/5/02 before Mag. Judge Kenneth J. Benson [Reporter: none] (plh) (Entered: 08/08/2002)

09/12/2002 15 ORDER REFERRING CASE to Mag. Judge Robert C. Mitchell (signed by Judge D.B.Smith on 9/12/02) CM all parties of record. 9jsp) (Entered: 09/13/2002)

09/20/2002 16 MOTION by JEFFREY BEARD for Summary Judgment with Proposed Order. (plh) (Entered: 09/20/2002)

09/20/2002 17 STATEMENT OF MATERIAL FACTS by JEFFREY BEARD (plh) (Entered: 09/20/2002)

09/20/2002 18 BRIEF by JEFFREY BEARD in support of [16-1] motion for Summary Judgment by JEFFREY BEARD (plh) (Entered: 09/20/2002)

09/20/2002 19 APPENDIX to [16-1] motion for Summary Judgment by JEFFREY BEARD (plh) (Entered: 09/20/2002)

09/27/2002 20 MOTION by RONALD BANKS for Summary Judgment with Proposed Order. (plh) (Entered: 09/27/2002)

09/27/2002 21 BRIEF by RONALD BANKS in support of [20-1] motion for Summary Judgment by RONALD BANKS (plh) (Entered: 09/27/2002)

09/27/2002 22 APPENDIX to [21-1] support brief by RONALD BANKS (plh) (Entered: 09/27/2002)

10/03/2002 23 RESPONSE by RONALD BANKS to [16-1] motion for Summary Judgment by JEFFREY BEARD (plh) (Entered: 10/03/2002)

10/04/2002 24 ORDER that the Clerk of Court reassign this case to the Hon. Judge Terrence F. McVerry. (signed by Judge Robert J. Cindrich on 10/4/02) CM all parties of record. (plh) (Entered: 10/04/2002)

10/04/2002 CASE reassigned to Judge Terrence F. McVerry (plh) (Entered: 10/04/2002

11/15/2002 25 REPORT AND RECOMMENDATION of Mag. Judge Robert C. Mitchell singed on 11/15/02 Recommending that [20-1] motion for Summary Judgment be denied, [16-1] motion for Summary Judgment be granted; The parties have 10 days from the date of service to file objections to this Report and Recommendation. (plh) (Entered: 11/15/2002)

11/26/2002 26 OBJECTION by RONALD BANKS to [25-1] report and recommendations (plh) (Entered: 11/26/2002)

01/10/2003 Case closed (plh) (Entered: 01/13/2003)

01/10/2003 27 ORDER granting [16-1] motion for Summary Judgment denying [20-1] motion for Summary Judgment and Final Judgment is Entered by the Court. (signed by Judge Terrence F. McVerry on 1/10/03) CM all parties of record. (aen) (Entered: 01/23/2003)

01/23/2003 28 NOTICE OF APPEAL by RONALD BANKS from order dated 1/10/03 FILING FEE $105. RECEIPT #2011 TPO issued. (femp) (Entered: 01/23/2003)

01/23/2003 Certified copy of Notice of Appeal [28-1] appeal by RONALD BANKS, certified copy of docket, certified copy of order dated 1/10/03 mailed to USCA; copy of Notice of Appeal and information sheet to counsel of record, M.J. Mitchell and Judge McVerry. Copy of information sheet to appellant. (femp) (Entered: 01/23/2003)

01/27/2003 29 Transcript Purchase order re: [28-1] appeal by RONALD BANKS advising that an transcript is not needed for appeal purposes. (plh) (Entered: 01/27/2003)

01/27/2003 Record complete for Appeal purposes. certified copy of docket entries forwarded to USCA. (plh) (Entered: 01/27/2003)

01/31/2003 RECEIPT from USCA of receiving docket entries on 1/29/03. (plh) (Entered: 01/31/2003)

01/31/2003 USCA Case Number Re: [28-1] appeal by RONALD BANKS USCA NUMBER: 03-1245 (plh) (Entered: 01/31/2003)

02/28/2005 30 Status Conference set for 9:30 3/25/05 (plh) (Entered: 02/28/2005)

03/14/2005 31 NOTICE advising that the Status Conference is postponed until further notice. (plh) (Entered: 03/14/2005)

07/01/2005 32 MANDATE OF USCA as to [28] Notice of Appeal filed by RONALD BANKS. (cc3,) Modified on 7/28/2005; Recalled, see 33 (tt,). (Entered: 07/01/2005)

07/11/2005 33 ORDER of USCA as to [28] Notice of Appeal filed by RONALD BANKS. (cc3,) (Entered: 07/11/2005)

GENERAL DOCKET
US Court of Appeals for the Third Circuit

Court of Appeals Docket #: 03-1245 Filed: 1/29/03
Nsuit: 3555 Prison Condition
Banks v. Beard
Appeal from: United States District Court for the Western District of PA

Lower court information:

District: 0315-2 : 01-cv-01956
Trial Judge: Terrence F. McVerry, District Judge
Date Filed: 10/18/01
Date order/judgment: 1/23/03
Date NOA filed: 1/23/03

Fee Status: paid

Prior cases: None
Current cases: None

03-1245 Banks v. Beard

* * * * *

1/29/03 CIVIL CASE DOCKETED. Notice filed by Ronald Banks. (clc)

1/29/03 TRANSCRIPT PURCHASE ORDER (PART I), no proceedings in District Court. (clc)

2/5/03 APPEARANCE from Attorney Jere Krakoff on behalf of Appellant Ronald Banks, filed. (clc)

2/5/03 DISCLOSURE STATEMENT on behalf of Appellant Ronald Banks, filed. (clc)

2/7/03 APPEARANCE from Attorney Kemal A. Mericli on behalf of Appellee Jeffrey Beard, filed. (clc)

2/10/03 BRIEFING NOTICE ISSUED. Appellant brief and appendix due 3/24/03. (clc)

2/10/03 CERTIFIED LIST filed. (clc)

3/24/03 BRIEF/APPENDIX on behalf of Appellant Ronald Banks. Pages: 30, copies: 10, Delivered by mail, filed. Certificate of service dated 3/24/03. (gas)

3/24/03 APPENDIX on behalf of Appellant Ronald Banks. Copies: 4, Volumes: 2, Delivered by mail, filed. Certificate of service dated 3/24/03. (Volume 1 of the appendix is attached to the brief). (gas)

3/25/03 Notice of telephone request to Jere Krakofff for a motion to file 26 pages of appendix in minuscript. Response due in 3 days. (gas)

3/28/03 COMPLIANCE RECEIVED from Jere Krakoff with a motion to file portions of appendix in minuscript. (gas)

3/28/03 MOTION by Appellant Ronald Banks to file appendix containing 26 pages of minuscript, filed. Answer due 4/11/03 Certificate of Service dated 3/27/03. (gas)

4/7/03 ORDER (Clerk) granting motion to file appendix containing 26 pages of Minuscript by Appellant Ronald Banks with filing as of March 24, 2003, filed. (gas)

4/23/03 BRIEF on behalf of Appellee Jeffrey Beard. Pages: 22, Copies: 10, Word Count: 4,798, Delivered by mail, filed. Certificate of service dated 4/23/03. (gas)

5/9/03 REPLY BRIEF on behalf of Appellant Ronald Banks. Copies: 10, Delivered by mail, filed. Certificate of service date 5/9/03. (gpk)

8/13/03 CALENDARED for Wednesday, October 22, 2003. (mac)

10/22/03 ARGUED Wednesday, October 22, 2003 Panel: Alito, Fuentes and Rosenn, Circuit Judges. Counsel for Appellant: Jere Krakoff and Counsel for Appellee: Kemal A. Mericli (mac)

2/25/05 PUBLISHED PRECEDENTIAL REPORTED OPINION (*Alito, Fuentes, Authoring Judge and Rosenn, Circuit Judges). *With separate dissenting opinion by Judge Alito, filed. (clc)

2/25/05 JUDGMENT reversed and remanded. No costs are taxed, filed. (clc)

3/8/05 PETITION by Appellant for rehearing en banc, filed. Certificate of service dated 3/8/05. (clc)

3/22/05 ORDER (Scirica, Chief Judge, Sloviter, Nygaard, Alito, Roth, McKee, Barry, Ambro, Fuentes, Authoring Judge, Smith, Van Antwerpen and Rosenn, Circuit Judges) denying petition for en banc rehearing by Appellant. Chief Judge Scirica, Judge Nygaard, Judge Alito, Judge Barry and Judge Van Antwerpen would have granted rehearing en banc, filed. (clc)

3/28/05 MOTION by Appellee to stay mandate pending the filing of a petition for Writ of Certiorari, filed. Answer due 4/11/05. Certificate of Service dated 3/28/05. (clc)

5/16/05 ORDER (Alito, Fuentes, Authoring Judge and Rosenn, Circuit Judges) granting motion to stay mandate by Appellee Jeffrey Beard. Mandate hereby stayed to 6/29/05, filed: (clc)

6/30/05 Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellee Jeffrey Beard. Filed in the Supreme Court on 6/20/05 at Supreme Ct. case number: 04-1739. (jht)

7/1/05 MANDATE ISSUED, filed. (clc)

7/1/05 RECORD released. (clc)

7/11/05 ORDER (Clerk) to recall mandate. (clc)

11/17/05 U.S. Supreme Court order dated 11/14/05, at S.C. number: 04-1739, granting petition for writ of certiorari by Appellee Jeffrey Beard. filed. (jht)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD BANKS, for himself and on behalf of all similarly situated prisoners who are confined or will be confined in Long Term Segregation Units of State prisons located in the Western Judicial District of Pennsylvania,	:	C.A. 01-1956
Plaintiffs,	:	
v.	:	
JEFFREY BEARD, in his official capacity as Secretary of the Pennsylvania Department of Corrections,	:	
Defendant.	:	

COMPLAINT

I. Jurisdiction

1. The court's authority to hear this putative class action derives from 28 U.S.C. Section 1343, a federal statute that confers district court jurisdiction over cases alleging constitutional violations. This pleading alleges that a specified category of segregated Pennsylvania prisoners is being systematically denied access to newspapers, magazines, and photographs of family members and friends pursuant to statewide Department of Corrections policies which prohibit those inmates from having such items in their cells. Grounding their claims on the free speech component of the First Amendment, the putative class seeks declaratory and injunctive relief to end the ongoing

abridgment of their civil rights. These allegations give the court a sound jurisdictional basis to hear this controversy.

II. Parties

2. Ronald Banks, the representative plaintiff in this Section 1983 action, is a sentenced inmate of the Pennsylvania Department of Corrections. He is confined in a maximum security administrative custody housing area of the State Correctional Institution at Pittsburgh known as the Long Term Segregation Unit. As a "Phase 2" inmate of the Unit, Mr. Banks (like all other Phase 2 Long Term Segregation Unit inmates in the prison system) is prohibited by Department policy from receiving newspapers and magazines unless they are of a religious or legal nature. Moreover, like all other LTSU Phase 2 inmates, he is prohibited by state prison policy from having photographs of family members and friends in his cell.

3. Jeffrey Beard, the defendant in this case, is the Secretary of the Pennsylvania Department of Corrections – the administrator of a penal system that operates the State Correctional Institution at Pittsburgh and all other state prisons that are located in the Western District of Pennsylvania. In that capacity, Mr. Beard perpetuates, implements, and enforces the policies that are challenged in this case.

4. Secretary Beard has acted under color of state law when systematically depriving Ronald Banks and other similarly situated inmates of their constitutional right of free speech through enforcement of the challenged policies. He is sued in his official capacity.

III. Facts

5. Approximately two years ago, the Pennsylvania Department of Correctional established Long Term

Segregation Units in certain of its prisons to house inmates who are said to be too disruptive, violent, or problematic to confine in other housing areas.

6. Two prisons in the Western District of Pennsylvania (SCI Pittsburgh and SCI Greene) have Long Term Segregation Units which (in combination) house more than a hundred prisoners on any given day, any one of whom can be placed on or be transferred out of Phase 2 status at the decision of prison officials. On information and belief, at least fifty LTSU inmates at any point in time are on Phase 2 status, although their identifies change on an ongoing basis.

7. As a matter of DOC policy, inmates are sequestered in Long Term Segregation Units (and on Phase 2 LTSU status) for indeterminate lengths of time. As such, they can be confined for many months and even years under the most restrictive and rigorous conditions existing in the state prison system.

9. Among other things, Long Term Segregation Unit prisoners are routinely locked inside their cells at least 23 hours a day; are routinely isolated, one inmate to a cell, throughout the day; are required to eat all meals in their cells; are rarely able to speak to or socialize directly with other prisoners; are prevented by plexiglass barriers from touching or embracing relatives and friends during their limited visitation opportunities; have sparse opportunities to make telephone calls to relatives and friends; are limited to a form of outdoor "recreation" that consists of occupying a small "exercise" cage an hour a day; and are consigned to an existence of rigid isolation and enforced idleness for periods of many months and even years.

10. In this already severely restrictive environment, Department of Corrections policy categorically prohibits Phase 2 Long Term Segregation Unit inmates from

receiving newspapers or magazines directly from publishers, from prison libraries, or from any other source unless the publication is either religious or legal in nature.

11. Ronald Banks has been confined on Phase 2 status in SCI Pittsburgh's Long Term Segregation Unit since March 15, 2001. Over the course of this confinement (pursuant to DOC policy), SCI Pittsburgh officials repeatedly seized and kept from him copies of the Christian Science Monitor which were sent to him directly from the Christian Science Publishing Company through a subscription he had with the company.

12. The text of the Christian Science Monitor does not pose any meaningful risk to the security of the Long Term Segregation Unit, to the prison as a whole, or to the Department of Corrections. The content of the newspaper routinely addresses international news, health issues, governmental affairs, and other topics of current events that pose no threat to the security of the institution. It does not provide information regarding the means of escaping from prisons; does not facilitate or advocate the manufacture or use of weapons, alcohol or drugs; does not contain sexual or pornographic images; does not contain racist or other such inflammatory language; does not advocate violence; and does not otherwise jeopardize the operation of the State Correctional Institution at Pittsburgh or the State prison system.

13. The paper on which the newspaper is printed does not pose any meaningful risk to the security of the Long Term Segregation Unit where Ronald Banks is confined, to any other area of the State Correctional Institution at Pittsburgh, or to the Department of Corrections as a whole.

14. The fact that the seized newspapers were sent to Ronald Banks directly from the publisher and were

routinely subject to searches by prison personnel essentially eliminated the possibility that the materials were a means to smuggle contraband materials into him.

15. As a matter of routine practice and policy, thousands of inmates in the state prison system (including inmates in other forms of segregation) are allowed to receive newspapers, magazines, and other publications directly from publishers on an ongoing basis.

16. Denying Ronald Banks access to the Christian Science Monitor, to other comparable newspapers, or to magazines whose content does not otherwise offend Department of Corrections censorship policies, bears no reasonable relationship to legitimate penological purposes. The policy either serves no legitimate penological purpose or is an exaggerated response to a legitimate purpose.

17. Denying other Phase 2 Long Term Segregation Unit prisons access to newspapers, magazines, and other reading materials whose content does not otherwise offend Department of Corrections' censorship policy bears no reasonable relationship to legitimate penological interests. The policy either serves no legitimate purpose or is an exaggerated response to a legitimate purpose.

18. Ronald Banks is precluded as a result of his status as a Phase 2 Long Term Segregation Unit inmate from receiving and having photographs of his wife and other family members in his cell for the duration of his confinement on that status. This is also true, under Department of Corrections policy, for all other Phase 2 inmates.

19. As a matter of routine practice and policy, thousands of inmates in the Pennsylvania prison

system (including inmates in other forms of segregation) are permitted to receive and possess photographs of family members and friends.

20. Categorically prohibiting Ronald Banks and all other Phase 2 Long Term Segregation Unit prisoners from receiving and keeping photographs of family members and friends in their cells bears no reasonable relationship to legitimate penological interests. The policy either serves no legitimate purpose or is an exaggerated response to a legitimate penological interest.

IV. Class Action Allegations

21. This lawsuit, for the following reasons, satisfies the prerequisites of the Federal Rules of Civil Procedure for the certification of a Rule 23(b) to class:

1) The class is so numerous that the joinder of all members of the class is impractical. There are more than a hundred inmates in the Long Term Segregation Units in the Western District of Pennsylvania. On information and belief, at least half of them at any given time are on Phase 2 status and, therefore, are subjected to the challenged policies. Moreover, the makeup or composition of the Phase 2 category of prisoners is fluid inasmuch as inmates are placed on Phase 2 status on a regular and ongoing basis during the course of the year. As such, joinder of all members of the class is impractical during the anticipated course of this litigation.

2) There are questions of fact that are common to the class. Among the questions are whether the policies challenged in the complaint actually exist, and if so, the reasons for them; the strength of the connection between the policies and the asserted

reasons; and, ultimately, whether the policies offend the free speech rights of the class members.

3) The claims of the representative plaintiff is typical of the claims of the class. It is alleged that the challenged policies universally apply to all Phase 2 Long Term Segregated prisoners and preclude all Phase 2 inmates from receiving published newspapers, magazines, other comparable reading materials, and photographs. As such, the unconstitutional policies cast a shadow over every member of the putative class.

4) The representative plaintiff will fairly and adequately protect the interests of the class. The attorney who represents the named plaintiff is an experienced civil rights litigator. Moreover, there are no conflicts of interest involved in this case.

5) The defendant has acted or refused to act on grounds that are generally applicable to the class, thereby making final injunctive relief appropriate with respect to the class a whole. This is because the challenged policies have application to all members of the class.

V. Claim

22. The policy categorically denies Ronald Banks and other Phase 2 access to the kinds of publications involved in this case, offends the free speech component of the First Amendment to the United States Constitution.

23. The policy categorically denies Ronald Banks and other Phase 2 inmates the opportunity to receive and retain photographs of family members and friends violates the free speech component of the First Amendment to the United States Constitution.

VI. Equitable Relief

24. Ronald Banks and the inmates he represents have no adequate remedy at law to address the ongoing violations of their civil rights. As a result, the rights at stake will continue to be abridged unless and until the defendant is enjoined from doing so.

25. The defendant's policy of denying Ronald Banks and similarly situated inmates access to photographs of family members and friends offends the free speech component of the First Amendment to the United States Constitution.

VII. Remedies

26. Ronald Banks and the putative class he seeks to represent respectfully request the following relief to redress the harm inflicted by the constitutional torts described above:

a. Certification of this case as a Rule 23(b)(2) class action on behalf of all current and future Phase 2 Long Term Segregation inmates who are or will be confined in Pennsylvania Department of Corrections prisons within the venue of the Western District of Pennsylvania;

b. The entry of a declaratory judgment holding that their right to free speech has been violated by the policies challenged in this case;

c. The issuance of preliminary and permanent injunctions prohibiting the Secretary from continuing to deny them access to the publications that are at issue here and to photographs of family members and friends;

d. An award of reasonable attorneys' fees, costs, and expenses generated by the prosecution of this case; and

e. The granting of any other form of relief that is warranted by the circumstances of this case.

[Signature omitted in printing]
[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD BANKS, of himself and on behalf of all similarly situated prisoners who are confined or will be confined in Long Term Segregation Units of State Prisons located in the Western Judicial District of Pennsylvania,	)	
Plaintiff,	)	
v.	)	Civil Action No. 01-1956
JEFFREY BEARD, in his official capacity as Secretary of the Pennsylvania Department of Corrections,	)	
Defendant.	)	

DEFENDANT'S ANSWER TO COMPLAINT

AND NOW, comes the defendant, by his attorneys, D. Michael Fisher, Attorney General, Kemal Alexander Mericli, Senior Deputy Attorney General, Susan J. Forney, Chief Deputy Attorney General, Chief, Litigation Section, and files the following answer to plaintiff's complaint:

FIRST DEFENSE

Defendant responds to plaintiff's factual allegations as follows:

1. Paragraph 1 is a series of conclusions of law to which no response is required.

2. Admitted.

3. Admitted.

4. Paragraph 4 is a conclusion of law to which no response is required.

5. Admitted.

6. Admitted, correcting "identifies" to identities."

7. Admitted.

8. There is no paragraph 8.

9. Admitted.

10. Admitted.

11. Admitted in part and denied in part. The first sentence of paragraph 11 is admitted. After reasonable investigation defendant is aware that a copy of the Christian Science Monitor was confiscated as stated on one occasion but can neither admit or deny as yet if this occurred repeatedly – although it should have occurred in each instance. To this extent the allegations are denied and strict proof demanded.

12. After reasonable investigation and reflection, defendant can neither admit or deny the allegations of paragraph 12 without an extensive review of the origins, rationale and operation of the policy in question from the standpoint of prison security and general prison administration and the safe and effective operation of the LTSU program. Thus, they are denied and strict proof demanded.

13. After reasonable investigation and reflection, defendant can neither admit or deny the allegations of paragraph 13 without an extensive review of the

origins, rationale and operation of the policy in question from the standpoint of prison security and general prison administration and the safe and effective operation of the LTSU program. Thus, they are denied and strict proof demanded.

14. After reasonable investigation and reflection, defendant can neither admit or deny the allegations of paragraph 14 without an extensive review of the origins, rationale and operation of the policy in question from the standpoint of prison security and general prison administration and the safe and effective operation of the LTSU program. Thus, they are denied and strict proof demanded.

15. Admitted.

16. This paragraph is a conclusion of law to which no response is required or if deemed factual is denied and strict proof is demanded.

17. This paragraph is a conclusion of law to which no response is required or if deemed factual is denied and strict proof is demanded.

18. Admitted.

19. Admitted.

20. This paragraph is a conclusion of law to which no response is required or if deemed factual is denied and strict proof is demanded.

21. All remaining paragraphs are conclusions of law to which no response is required or if deemed factual are denied.

SECOND DEFENSE

To the extent plaintiff seeks relief from the defendant in his official capacity for claims in the nature of constitutional violation, it is barred by the Eleventh Amendment.

THIRD DEFENSE

At no time has the defendant, either individually or in concert, deprived or sought to deprive the plaintiff of any right, privilege, or immunity secured to him by the Constitution or laws of the United States.

FOURTH DEFENSE

Defendant has at all times relevant to the subject matter of plaintiff's complaint acted in good faith with a reasonable belief in the lawfulness of his actions.

FIFTH DEFENSE

Defendant is entitled to qualified immunity.

SIXTH DEFENSE

The claims against defendant do not fall within the nine (9) categories enumerated by § 522 of Act 152, 42 Pa. C.S.A. § 8522, and are also barred by the Doctrine of Sovereign Immunity and Official Immunity.

SEVENTH DEFENSE

The defendant was at all times material acting pursuant to duty required by statute or statutorily authorized regulations, and therefore, said acts were within the discretion granted to him by state or statutorily authorized regulations.

EIGHTH DEFENSE

The complaint fails to state a claim upon which relief can be granted.

NINTH DEFENSE

Any injuries received by plaintiff as are alleged in his complaint were the result of the actions of the plaintiff and the defendant cannot be held liable therefor.

WHEREFORE, defendant requests judgment in his favor and against plaintiff.

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[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD BANKS, of himself and on behalf of all similarly situated prisoners who are confined or will be confined in Long Term Segregation Units of State Prisons located in the Western Judicial District of Pennsylvania,	)	
Plaintiff,	)	
v.	)	Civil Action No. 01-1956
JEFFREY BEARD, in his official capacity as Secretary of the Pennsylvania Department of Corrections,	)	
Defendant.	)	

DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. The Long Term Segregation Unit (LTSU) of the Pennsylvania Department of Corrections is housed at SCI-Pittsburgh. At a maximum population of 40, comprised of inmates all of whom are either undergoing disciplinary confinement or are in administrative custody status, it constitutes approximately one tenth of one percent of (.10%) of the state prison system's population, who are its most incorrigible, recalcitrant inmates. Appendix A, Deposition of Deputy Superintendent Dickson (hereinafter "Deposition") at 25, 28, 85. These men, by and large, previously have failed to behave properly in the environment of a Special Management Unit.

2. Simply put, these men are the "worst of the worst" of the state prison system. Deposition at 87-88, 92. They have proven by the history of their behavior in prison, the necessity of holding them in the rigorous regime of confinement defined by the LTSU Program. Id., at 92.

3. At the entry level phase or "Level 2" of the LTSU (in which each LTSU inmate spends a minimum of 90 days and a custody level to which some frequently return, while many other never succeed in transcending its strictures and remain on it for the entire period of their LTSU confinement because the corrections officials who control promotion do not think their behavior warrants their movement to "Level 1"), inmates are not permitted common, secular newspapers or magazines, or to keep pictures of their family or loved ones in their cells. Id., 18-19, 46-48, 68-70. An inmate in the LTSU can remain on Level 2 status indefinitely. Id.

4. By contrast, a "Level 1" inmate can have an ordinary general circulation newspapers and up to five (5) magazines in his cell on the basis of a one-for-one exchange; the photo prohibition, however, is unaltered.

5. LTSU Phase 2 inmates have no access to the newspapers and magazines in the prison library. They cannot go to the prison library. Id., at 46-48. Nor can they receive news clippings or articles in the mail unless they have a personal nexus. Id.

6. Behavior modification is an aspect of the LTSU, as it is for the entire state prison system. Id., at 24-25.

7. According to Deputy Superintendent Joel Dickson, whose duties include supervision of the LTSU at SCI-Pittsburgh, and who is the designated spokesperson for the DOC on its LTSU policies, the

LTSU prohibitions at issue in this case have three interlocking penological rationales. Id., 85-88.

8. It serves the primary, most important purpose of behavior motivation of particularly difficult prisoners to encourage the transformation of all of them into better integrated members of the broader prison society and, the ultimate transformation of some of them into members of free society. Because the restrictive newspaper/magazine policy comprising a total prohibition for Level 2 inmates, is ameliorated for Level 1 LTSU inmates and RHU inmates, while it is virtually non-existent for general population inmates so far as general circulation publications are concerned, it provides the Level 2 inmates with the prospect of earning a privilege through compliance with orders and remission of various negative behaviors and serves to encourage the progress and discourage backsliding by the level 1 inmates. Id. Similarly RHU and disciplinary inmates can possess up to 10 personal photographs in their cells and their is virtually no restriction on possession on such photographs by ordinary inmates in general population.

9. It serves a secondary purpose: the less property these high maintenance, high supervision, obdurate troublemakers have, the easier it is for the unit's correctional officer to detect concealed contraband to provide security. Id.

10. Third, newspapers and magazines can be used as weapons, (i.e., rolled up into "blow guns" and "spears") or employed as tools to catapult feces at the guards without the necessity of soiling one's own hands and as tinder for cell fires. Id., and 91. It is thought that an inmate is much less likely to use his religious publications or his personal legal materials, to which the First Amendment protects his continued access to some degree, in his LTSU cell for this distinctly disgusting and profane enterprise.

11. The Eighth Amendment legitimately constrains the array of punishments, behavior incentives and forms of deprivation that the prison system can use to modify the behavior of recalcitrant inmates. Id., at 88.

12. Only one LTSU inmate at a time may be let out of his cell and is transported from it in hand and leg irons by an escort of two corrections officer exerting control by means of a tether. Id., at 89.

13. There is a mini-law library on the LTSU comprising a reading room with seating for one inmate at a time. Id., at 88-89.

14. These policies do not absolutely prevent either the cell fires on the throwing of feces. Id., at 93, 95-96.

[Signature omitted in printing]
[Certificate of Service omitted in printing]

LONG TERM SEGREGATION UNIT

(LTSU)

RULES AND REGULATIONS

INMATE COPY

WHILE HOUSED IN THE LONG TERM SEGREGATION UNIT YOU ARE EXPECTED TO ADHERE TO THE RULES, REGULATIONS AND SCHEDULES CONTAINED HEREIN.

REVISED: JANUARY 2001

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LTSU RULES 10-11

LONG TERM SEGREGATION UNIT
JANUARY 2001

A. Purpose

The LTSU is an area consisting of maximum security housing coupled with extremely limited programming and privileges. You were referred for placement in the LTSU by either your parent institution or SMU. Placement criteria include but are not limited to: failure to complete an SMU program or failure to make adequate progress; demonstrated inability or unwillingness to conform to the requirements of general population; continued manifestation of a negative influence on the safety and security of the PA Department of Corrections; or participation in criminal activities which may threaten the community.

Final determination for placement is made by the Executive Deputy Secretary. Placement is anticipated to be long term, though progress reviews are conducted every 30 days.

Release from the LTSU will be determined by the Executive Deputy Secretary and will be based upon your positive adjustment. Unit staff will provide you with additional guidance.

B. Staffing

Superintendent – Phillip Johnson
Superintendent Assistant (Grievance Coordinator) – Tim Collins
Deputy Superintendent for Facility Management – William S. Stickman
Deputy Superintendent for Centralized Services – Mark A. Krysevig
Deputy Superintendent for Internal Security – Joel S. Dickson

LTSU Lieutenants – Lt. Anthony Bovo and Lt. Greg Mohring
Unit Manager – Rebecca Kessler
Counselors – Nick Bachism and Ken Martin
Psychology – Sandra Vujnovic
Hospital Administrator – Joan Delie
Chaplain – Father Terza
Librarian – Katherine Manners
CCPM – Debra Sauers
Inmate Accounting – Diane Detwitler
Business Manager – Paula Toski
Mail Department – Tonya Edwards
Parole – Dan Fedeanis
Major of the Guard – James McFetridge
Major of Unit Management – Chris Montenaro

C. GENERAL RULES

1. Privileges/Programming

a. Level 2

Level 2 is the most restrictive level of confinement and provides the least amount of privileges/programming. All new receptions begin on Level 2 for a minimum of 90 days. Inmates serving DC time will remain on Level 2 until they have completed their time or have had their remaining time set aside. Privileges afforded Level 2 inmates are as follows:

(1) In cell activities
(2) In cell counseling services
(3) Employment as a unit janitor if approved by Unit Management Team
(4) 1 Hour, 5 days per week of outside yard
(5) Recreational and legal law library services
(6) Legal and personal correspondence
(7) In cell religious visits by a Chaplaincy
(8) Three (3) showers per week

(9) One (1) visit, non-contact, immediate family only, per month

(10) Emergency phone calls only once approved and verified by Unit Management Team

b. Level 1

Level 1 provides for increased programming and privileges. They are available to those inmates who have demonstrated a satisfactory adjustment at Level 2. No DC cases can be placed in Level 1. Level 1 shall be the least restrictive available in the LTSU. In addition to those available to Level 2 inmates, the following privileges/programming will be available to Level 1 inmates (See Attachment A):

(1) Two (2) visits, non-contact, immediate family only, per month.

(2) One (1) fifteen (15)-minute telephone call per month.

(3) Commissary purchases of five dollars ($5.00) per week* (*Allowable items will be defined by PRC.).

(4) Five (5) magazines, one (1) newspaper (daily exchange) and leisure books as determined by the Unit Management Team.

(5) Programming: In cell study (G.E.D. and Special Education only).

(6) Additional privileges/cell property may be authorized at the discretion of the Unit Management Team or PRC.

c. Suspension of Privileges

Inmates may lose any privileges if their behavior is deemed to warrant such loss. This will be

accomplished via Unit Team action, in response to a DC-134 report or misconduct, and shall be documented in the DC-14. The Unit Team shall have total authority regarding what privileges and for what period the privileges shall be forfeited. These actions shall be administrative in nature.

2. Property

Inmate property of those admitted to the LTSU will be controlled in the following manner:

a. No item made partially or entirely of glass will be permitted to be maintained by an LTSU inmate in his cell.

b. Any item of inmate property may be confiscated from an LTSU inmate if the inmate is using or altering the property in such a way that it is considered a threat to the safety and security of the institution.

c. Indigent LTSU inmates may request stationary supplies should submit a request slip to the Unit Lieutenant. He/she will forward it to the Institutional Business Manager for verification. Flexible security pens will be issued by unit staff.

d. The LTSU Sergeant or Lieutenant will ensure that the inmate is provided the essential articles for proper hygiene and comfort. These articles will be supplied from the LTSU supplies when necessary.

The items will include:

(1) Coveralls (1 pair)
(2) Underclothing (3 Shorts, 3 T-Shirts)
(3) Socks (3 pairs)
(4) Bedding (1 Pillow Case, 2 Sheets, 1 Blanket)

(5) Personal Hygiene Essentials
(6) Towel and Washcloth

In addition the inmate may retain:

(1) One (1) Box of legal and/or religious material.
(2) One (1) Tablet of writing paper
(3) Ten (10) Envelopes
(4) One (1) Wedding band (no other jewelry)
(5) One (1) Pair shower shoes
(6) Ten (10) Personal letters (photos will be confiscated and stored with inmate property.
(7) Personal items (glasses, dentures, address book, etc.)

3. Visiting

The number of visitors permitted at any given time is limited to two (2). This may be two (2) adults or one (1) adult and one (1) child under the age of eighteen (18). The Shift Commander has the discretion to permit additional visitors such as small children and/or infants on a case-by-case basis. Visiting hours are 8:00 AM to 3:30 PM, Monday through Friday.

a. Level 2

One non-contact weekday visit (of at least one hour) is permitted per month with immediate family only. No holiday visits are permitted.

b. Level 1

Two (2) non-contact weekday visits (of at least one hour) per month with any approved visitor is authorized. No holiday visits are permitted.

c. Legal visits are unlimited in number but are subject to space availability.

4. Religious Privileges

Inmates confined in the LTSU are not permitted to attend religious services in the Chapel. Inmates in LTSU shall be visited by a Facility Chaplain on a daily basis, when available in the facility and weekly by a Chaplain of the inmate's faith, if available.

5. Mail and Incoming Publications

a. All mail for inmates housed in the LTSU will be handled in accordance with DC-ADM 803, "Inmate Mail and Incoming Publications."

(1) Incoming mail will be delivered to the LTSU each day that the mailroom is in operation and distributed to LTSU inmates by LTSU officers.

(2) Legal mail will be logged noting both the receiving inmate's name and number and the sender's name, address, date and time delivered. Legal mail will be opened in the presence of the inmate by the LTSU officers. The legal mail will be inspected for contraband but not read.

(3) All regular mail will be inspected for contraband in the mailroom prior to delivery to the LTSU.

(4) Inter-Institution mail, which arrives in the LTSU in a sealed envelope, will be treated as legal mail and opened and inspected in the presence of the inmate.

b. All outgoing mail is to be given to the Officer when the morning Food Trays are picked up. This also includes Request Slips and other correspondence to Staff.

6. Barber Services

All inmates are required to maintain grooming standards in accordance with Department policy DC-ADM 807, "Inmate Hygiene and Grooming."

LTSU inmates will be eligible for a haircut once each thirty (30) days.

When your pod is eligible you will be notified to sign up on the 2-10 Shift, and you will receive your haircut the following day.

7. Exercise

Inmates shall be permitted one (1) hour, five (5) days per week. All LTSU inmates will be exercised individually. Before leaving your cell, you will be strip searched. You will then be handcuffed behind your back and escorted to the yard. You will not be moved until properly secured. You are not permitted to take any thing with you to the yard.

On scheduled days, Block Officers will compile a list of inmates desiring to take yard, shower, or shave using the DC-707. Inmates must give a clear verbal or physical response for accepting or refusing the service.

8. Showers

Inmates in the LTSU will be offered a minimum of three showers per week absent any activity restriction.

You will be limited to ten (10) minutes per shower. Towel, shampoo and soap will only be permitted in the shower. You are not permitted to do laundry in the shower. No clothing will be worn to the shower. Shower schedules are Monday, Wednesday and Friday.

9. Shaving Privileges

Inmates in the LTSU will be offered a minimum of three opportunities to shave a week, absent any activity restriction.

Shaving kits will be passed out and collected the same day. Any damage to these items will result in a Misconduct and possible loss of shaving privileges.

COMMISSARY: (LEVEL 1 ONLY)
You will be permitted to purchase commissary bi-weekly. You will only be permitted to purchase items approved by PRC. You are not permitted to stockpile commissary items in your cells.

COMMISSARY SCHEDULE:
Every Other Tuesday – Slips passed out (AM)
Following Day Wednesday – Slips picked up (AM)
Following Tuesday – Commissary passed out (AM

SICK CALL:
Fill out an Inmate Request Slip stating what it is you need to see the doctor for. Drop in Sick Call Box in the hallway on your way to Yard or give it to the Nurse.

LINEN AND JUMPSUITS:
Laundry services shall be provided on a weekly basis. Linen and towels shall be exchanged on Wednesday during the 2-10 shift. Issued linens include: one (1) towel, two (2) sheets, one (1) pillowslip and one (1) blanket. The Blanket provided is laundered once per year (minimum).

Jumpsuits will be exchanged twice per week on Tuesdays and Fridays.

Laundry bags will be given out for personal clothing. Bags will be picked up on Thursdays and returned on Mondays.

All linen and clothing shall be used for its intended purpose only and not for curtains, rugs, or decorations. Any misuse of these items, alteration, tampering, or destruction shall result in a misconduct.

CUPS/SPOONS:
Cups and spoons will be exchanged daily. All cups and spoons will be exchanged for new ones on a one for one basis. They will be passed out with the morning meal and collected following the evening meal.

LIBRARY:
The inmate fills out an RHU Library Book Request Slip (attached) and passes it to a block officer to place in the in-house mail. You are permitted two leisure books at one time. You must return a book you have out to receive an additional book.

LAW LIBRARY:
You must fill out an Inmate Request Slip, stating you wish to use the Law Library. Use will be granted on a First Come First Served Basis. You may use the Law Library for two (2) hours.

SMOKING/TOBACCO:
No smoking tobacco products, smokeless tobacco or flame producing materials in the RHU/LTSU.

10. Changes in Levels

a. Upon reception into the unit, you will undergo an evaluation by the Unit Management Team who will communicate a baseline of behavior expectations.

b. The Unit Team shall develop a new Prescriptive Program Plan at that time. New Prescriptive Program Plan will be developed after each 30 days review.

c. The following factors will be considered prior to advancement to the next level:

(1) Time in level;
(2) Continued facility risk on or off the LTSU;
(3) Number, type, and frequency of misconducts;
(4) Involvement in self-improvement activities;
(5) Block behaviors:
(a) quarters sanitation;
(b) personal hygiene and grooming;
(c) response to verbal and written orders;
(d) response to authority;
(e) interaction with other inmates;
(f) completion of specific goals as set by Unit Team;
(g) demeanor with staff on the block and at periodic reviews.
(h) work performance

d. All movement from level 2 to level 1 will be through staff action by the Unit Team and documented by a vote sheet with final approval by the Superintendent.

e. The Facility Manager, upon the recommendation of both the LTSU Unit Manage-ment Team and the PRC, may temporarily "set aside" the inmate's accumulated DC time, assaultive and non-assaultive, to allow the inmate to advance to Level 1. Time set aside may be done in steps, particularly with those inmates who have substantial DC time to serve.

(1) The PRC may continue to reduce the permanent DC time for non-assaultive misconducts, which has been "set aside," at periodic reviews.

(2) If an inmate successfully completes the LTSU program, any "set aside" DC time shall be eliminated.

(3) While assigned in the LTSU, an inmate shall continue to receive a credit towards DC time to be served.

(4) If the inmate receives a misconduct while in the LTSU or does not complete the program, any remaining DC time shall be reinstated.

f. Inmates can be demoted by the same procedure. However, if an inmate is found guilty of a misconduct for which a period in disciplinary custody is the penalty, the inmate shall automatically be demoted back to Level 2, and any DC time which was previously set aside shall be restored.

g. Inmates may be considered for release at any time and at least annually. The Unit Team and Facility Manager will forward recommendations to the Regional Deputy Secretary. Final approval is by the Executive Deputy Secretary.

h. Release can be to a SMU, RHU, general population or other appropriate facility depending on the specific needs of the inmate.

11. Counts

a. All inmate counts will be conducted in accordance with Department Policy 6.3.1.

b. Seven routinely scheduled counts shall be taken daily. You are required to stand and be in clear view during the following counts: 0600, 1230, 1530 and 2100.

12. Cell Searches/Security Inspections/Cell Rotation

a. All cells shall be subjected to a security inspection at least three times per week.

b. All cells shall be thoroughly searched at least once per week.

c. All inmates will be required to change cells monthly.

Commonwealth of Pennsylvania
DEPARTMENT OF CORRECTIONS
SCI-Pittsburgh
412-761-1955

June 4, 2001

SUBJECT: ADDENDUM TO LTSU INMATE HANDBOOK
RE: IN-CELL PROGRAMMING

TO: All LTSU Inmates

FROM: Joel S. Dickson
Deputy Superintendent
Internal Security

BY: Debra K. Sauers
Corrections Classification & Program Manager

In-cell programming is available to Level 1 LTSU inmates. Level 1 inmates who are interested in participating should discuss this with their counselor. The unit management team will recommend participation to the PRC. PRC will review and approve or disapprove the recommendation.

Programming is currently available in the following areas: substance abuse; anger/violence management; life skills; parenting skills; and effective emotional expression.

Inmates may participate in one program at a time. Upon completion of a program, another program may be recommended for approval.

JSD/DKS:lp
cc: Superintendent Johnson
Deputy Stickman
Deputy Krysevig

Major McFetridge
Major Montenaro
RHU Lieutenants
A-3 Sergeants
File (2)

LTSU RULES:

1 You must have your jumpsuit all the way on any time you are out of your cell. The ONLY exception will be going to and coming from the shower. You are NOT PERMITTED to wash your laundry in the shower.

2 You are NOT PERMITTED to pass, pick up or trade off any materials or items while you are housing in this Unit. Doing so will result in a Misconduct.

3 You are NOT PERMITTED to cover your cell door. Also, you are NOT PERMITTED to cover, block or attach anything to the cell light fixture or air vent.

4 You are NOT PERMITTED to have anything attached to the walls of your cell. This includes, but is not limited to Pictures, Posters, Cards, etc.

5 Defacing any part of the cell by writing, drawing or any other method will not be permitted. This includes: Lights, Desk, Cabinet, etc.

6 Loud talking or yelling from cell to cell WILL NOT BE PERMITTED at any time.

7 It will be your responsibility to maintain your cell in a clean and orderly manner. You will be issued cleaning materials once a week for this purpose. Proper care and attention to State Property such as: Mattress, Pillow, Sheets, Towels, Jumpsuits, etc. must be exercised.

8 You will be permitted only State issued clothing while housed in the Unit. This will consist of: one (1) pair of State "Sneakers", three (3) pairs of

underwear, three (3) pairs of socks, three (3) T-shirts and one (1) jumpsuit.

9 You are not permitted to throw anything out of your cell. Trash will be collected periodically by the Block Officer on a schedule to be determined. Anyone throwing food from the Food Trays, will be fed with inserts only, and will receive a Misconduct.

10 In order to facilitate being searched upon leaving your cell, you MUST PLACE YOUR HANDS BEHIND YOU TO BE HANDCUFFED. You will step out of your cell to be Searched. When returning from the Exercise Yard, you will enter your cell and place your hands through the Food Slot to be uncuffed. You will remain fully dressed at all times.

11 Whenever you are out of the Unit, you will not attempt to introduce any contraband into the Unit upon your return. This includes ANYTHING that was not in your possession when you left the Unit.

12 Under NO CIRCUMSTANCES are you to mark, write on, or otherwise deface or damage the Food Trays provided to you.

13 You are required to stand and be in Clear View of the Officers during the following Security Checks (COUNTS): 0600, 1230, 1530, 2100

14 If you receive a Newspaper, you must turn in the whole Newspaper from the prior day (e.g. to get Tuesday's paper, you must turn in Monday's Newspaper).

NOTE: ANY NON-COMPLIANCE WITH THE AFOREMENTIONED REGULATIONS WILL SUBJECT YOU TO DISCIPLINARY ACTION. YOU ARE TO OBEY ANY ORDER GIVEN TO YOU BY A STAFF MEMBER. EVEN THOUGH IT MAY, AT TIMES, CONFLICT WITH THE SCHEDULE AND/OR REGULATIONS AS STATED.

JSD/cr

/s/
Joel S. Dickson
Deputy Superintendent for
Internal Security

I HAVE READ AND UNDERSTAND THE ABOVE SCHEDULE.

_____ / _____ _____
Inmate Signature DC Number Date

_____ _____
Witness (Officer) Signature Date

LONG TERM SEGREGATIO NIT PRIVILEGES

	PRIVILEGES		PROGRAM SERVICES	
LEVEL II	Smoking:	None	Medical/Dental:	Screened on Unit
	Visits:	One (1) per month, non-contact weekdays only, immediate family Legal are unlimited	Mental/Health:	Seen on unit.
	Exercise:	One (1) hour per day, five (5) days per week	Religious:	Cell visits by Chaplains
	Telephone:	Emergency only	Counseling:	In cell
	Radio/Tv:	None	Activities:	In cell
	Commissary:	None	Education:	None
	Legal/Religious Materials:	One (1) records center box	Employment:	Unit Janitor
	Mail:	Legal and personal correspondence	Library:	Two (2) leisure books at a time.
	Personal Property:	Shower shoes, dictionary, ten (10) letters, eyeglasses, address book, and dentures	Pay:	None
	Showers:	Three (3) per week		
LEVEL I	Smoking:	None	Medical/Dental:	Screened on Unit
	Visits:	Two (2) per month, non-contact weekdays only, immediate family Legal are unlimited	Mental/Health:	Seen on Unit
	Exercise:	One (1) hour per day, five (5) days per week	Religious:	Cell visits by Chaplains
	Telephone:	One (1) fifteen (15) minute call per month (non accumulative)	Counseling:	In cell
	Radio/Tv:	None	Activities:	In cell
	Commissary:	Five dollars ($5.00) per week ($10.00 every two weeks) (Items as defined by the Unit Team)	Education:	GED and Special Education, in cell study only
	Legal/Religious Materials:	One (1) records center box	Employment:	Unit Janitor
	Mail:	Legal and personal correspondence, five (5) magazines, one (1) newspaper (daily exchange)	Library:	Two (2) leisure books at a time
	Personal Property:	Shower shoes, dictionary, ten (10) letters, eyeglasses, address book, and dentures	Pay:	As per DC-816 Inmate Compensation System
	Showers:	Three (3) per week		

COMMONWEALTH OF PENNSYLVANIA
Department of Corrections
SCI-Pittsburgh, Internal Security
(412) 761-1955 Ext. 218
February 8, 2001

SUBJECT: "GRATERFRIENDS"

TO: LTSU Inmates

FROM: Joel S. Dickson
Deputy Superintendent for Internal Security

The publication "GRATERFRIENDS" is characterized as a newsletter. It is not legal mail. As such, it is denied to Level 2 inmates and permitted for Level 1 inmates.

JSD/cr

cc: Superintendent Johnson
Deputy Stickman
Deputy Krysevig
Ms. Rebecca Kessler
RHU Lieutenants
Mailroom

304
RT II

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS
P.O. BOX 598
CAMP HILL, PA 17001

FICIAL INMATE GRIEVANCE
IAL REVIEW RESPONSE

GRIEVANCE NO. PIT-0493-01

(Name & DC No.)	FACILITY	HOUSING LOCATION	GRIEVANCE DATE
Ronald Banks, DZ 5843	SCI-Pittsburgh	A3 B-1006	4/25/01

following is a summary of my findings regarding your grievance

le items that were confiscated were deemed not to be religious material by Deputy Dickson and the plaincy Department. You are currently a Level 2 in the LTSU and are not permitted magazines or ewspapers

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Mohring RHU Lt	Carl A Mohring	5-2-01

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WEEKLY BOOK DELIVERY SCHEDULE FOR A-3

August 2002

FROM: JAMES WEST

Monday	Tuesday	Wednesday	Thursday	Friday
NOTE: NEW REQUESTS FOR BOOKS MUST BE RECEIVED MONDAY MORNING TO INSURE THURSDAY BOOK DELIVERY.			1	2
5 NEW BOOK REQUESTS DUE FOR AUGUST 8TH DELIVERY	6	7	8 BOOK DELIVERY	9
12 NEW BOOK REQUESTS DUE FOR AUGUST 15TH DELIVERY	13	14	15 BOOK DELIVERY	16
19 NEW BOOK REQUESTS DUE FOR AUGUST 22ND DELIVERY	20	21	22 BOOK DELIVERY	23
26 NEW BOOK REQUESTS DUE FOR AUGUST 29TH DELIVERY	27	28	29 BOOK DELIVERY	30

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RENEWAL LIST NO	3292	9
ACCT NO.	TN-OS-S-85055-00	
AG DATE	DEC 20, 2001	

6000-12462

TITLE CODE	QTY	NAME OF PUBLICATION	FOR	STARTING	★ PRICE UNIT	★ PRICE EXTENSION
THIS RENEWAL LIST INCLUDES ALL SUBSCRIPTION ORDERS PLACED WITH THE PUBLISHERS BY EBSCO AS YOUR AGENT AND INVOICED THROUGH 11/21/2001. IF A RECENT CHANGE IN YOUR RENEWAL LIST, SUCH AS CANCELLATION OR ADDITION DOES NOT APPEAR, IT MISSED THE RENEWAL LIST PRODUCTION CUT-OFF DATE INDICATED ABOVE. THESE CHANGES ARE RECORDED IN OUR FILE AND WILL BE INCORPORATED INTO YOUR RENEWAL INVOICE. SEND TO - 30-10 STATE CORR INSTITUTE SCIP LIBRARY 3001 BEAVER AVE PITTSBURGH PA 15233			TERM SHOWN BELOW WILL BE ORDERED NONCANCELLABLE APPLIES AFTER RENEWAL ORDER IS PROCESSED			
313361115 *(00059)	1	ERIE TIMES NEWS /MON-SAT/ /BY MAIL/ /ALL EXC CERTAIN ZIP CODES/ **OR** /INCORPS/ ERIE MORNING NEWS 8916857	1 YR	01-01-2002	16600	16600
377351002 *(00060)	1	GREENSBURG TRIBUNE REVIEW /DAILY & SUNDAY/ /BY MAIL/ **OR** VOL/TITLE INFO NEEDED 8916857 PUB ID M03284	1 YR	01-01-2002	24920	24920
596245878 *(00061)	1	MORNING CALL /DAILY AND SUNDAY/ /BY MAIL/ **L2** **DS** 8916857 PUB ID 9469626	1 YR	05-01-2002	41352	41352
627806003 (00062)	1	NEW PITTSBURGH COURIER - CITY EDITION **L1** **SW** PUBL WEDNESDAY & SATURDAY 8916857	1 YR	06-01-2002	4000	4000
630780000 (00063)	1	NEW YORK TIMES - METRO NY ED /INCLS/ SECTIONS 4 9 & 10 /7 DAY/ /BY MAIL/ **L1** **DS** /INCLS/ NEW YORK TIMES MAGAZINE COMBINATION VOL 106, 2002 8916857	1 YR	02-01-2002	56160	56160
636555005	1	NEWSWEEK - REGULAR ED **/	1 YR	04-01-2002	4200	4200

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	ACCT NO	TN-05-S-85055-00
AG	DATE	DEC 20, 2001

TITLE CODE	QTY	NAME OF PUBLICATION	FOR	STARTING	★ PRICE UNIT	★ PRICE EXTENSION
(00064)		AG **WK** PUBL WEEKLY 8916857 (SP)				
643831308 (00065)	1	NOTICIAS DEL MUNDO /FOR US/ **DA** 8916857	1 YR	02-01-2002	12480	12480
80226180 (00066)	1	PATRIOT NEWS C-W SUNDAY PATRIOT-NEWS **L1** **DS** COMBINATION 8916857	1 YR	01-01-2002	32720	32720
39702009 * (00067)	1	PHILADELPHIA DAILY NEWS /DAILY/ /BY MAIL/ **DA** PUBL MON THRU SAT 8916857	1 YR	01-01-2002	27500	27500
39775005 (00068)	1	PHILADELPHIA INQUIRER /SUNDAY/ /BY MAIL/ **SU** 8916857	1 YR	04-01-2002	17900	17900
39923001 (00069)	1	PHILADELPHIA TRIBUNE /ONCE A WEEK/ **WK** NONCANCELLABLE 8916857	1 YR	05-01-2002	3100	3100
698755543 (00070)	1	PITTSBURGH TRIBUNE REVIEW /DAILY & SUNDAY/ /BY MAIL/ **DS** 8916857 PUB ID M07502	1 YR	05-01-2002	24920	24920
92081001 (00071)	1	~~TIME~~ DOMESTIC ED /**/ /FOR US & POSSESSIONS ONLY/ /SURFACE MAIL/ **OR** 8916857 (SP)	1 YR	06-01-2002	7613	7613
18170770 (00072)	1	USA TODAY /**/ /THE NATIONS NEWSPAPER/ /US LIBRARIES AND INSTITUTIONS ONLY/	1 YR	12-01-2001	12900	12900

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YOUR PURCHASE ORDER NO.	ACCOUNT NO.	DATE	REF CODE	INVOICE NO.	PAGE NO.
1/24/02	TN-S-85055-00	04-11-2002		8943235	1

TITLE NUMBER	QTY	NAME OF PUBLICATION	PUB	EBSCO NUMBER TO PUBLISHER	TERM START D/T	T	PRICE UNIT	PRICE EXTENSION
313361115	1	ERIE TIMES NEWS /MON-SAT/ /BY MAIL/ /ALL EXC CERTAIN ZIP CODES/ /INCORPS/ ERIE MORNING NEWS	DR	1165391	U 1 YR 01/01/2002	R	16600	16600
377351002	1	GREENSBURG TRIBUNE REVIEW /DAILY & SUNDAY/ /BY MAIL/ VOL 117 STARTS 01-2002 1)•VOL 117 PID# M03284	DR	1165759	U 1 YR 01/01/2002	R	24920	24920
596245878	1	MORNING CALL /DAILY AND SUNDAY/ /BY MAIL/ PID# 9469626	DS	1166894	U 1 YR 05/01/2002	R	42352	42352
627806003	1	NEW PITTSBURGH COURIER - CITY EDITION PUBL WEDNESDAY & SATURDAY VOL 93 STARTS 06-2002	SW	1161134	U 1 YR 06/01/2002	R	5000	5000
636555005	1	NEWSWEEK - REGULAR ED /**/ 05-07 CLAIMS ACCEPTED FOR SPEC ED-YOUR CHILD "CORRECTED" CHART ONLY-COMPLETE CORRECTED VERSION MUST BE PURCHASED AS SINGLE ISSUE UNLESS SUB IS HOSPITAL OR DOCTORS OFFICE PUBL WEEKLY VOL 139 STARTS 04-2002	WK	1167152	U 1 YR 04/01/2002	R	4200	4200
643831308	1	NOTICIAS DEL MUNDO /FOR US/ VOL 22 STARTS 02-2002	DA	1167224	U 1 YR 02/01/2002	R	13480	13480
680226008	1	PATRIOT NEWS - MORNING-DAILY /COMES ALSO WITH/ SUNDAY PATRIOT NEWS PUBL DAILY EXCEPT CHRISTMAS NONCANCELLABLE	DA					
680226180	1	PATRIOT NEWS C-W SUNDAY PATRIOT-NEWS COMBINATION VOL 53 STARTS 01-2002	DS	1167444	U 1 YR 01/01/2002	R	23360	23360
689702009	1	PHILADELPHIA DAILY NEWS /DAILY/ /BY MAIL/ PUBL MON THRU SAT	DA	1161583	U 1 YR 07/01/2002	R	36100	36100
689775005	1	PHILADELPHIA INQUIRER /SUNDAY/ /BY MAIL/ PID# 47790263	SU	1167539	U 1 YR 04/01/2002	R	17900	17900
689923001	1	PHILADELPHIA TRIBUNE /ONCE A WEEK/ NONCANCELLABLE CONTINUED ON NEXT PAGE	WK	1167540	U 1 YR 05/01/2002	R	4100	4100

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24/02	TN-S-B5055-00	04-11-2002		8943235	2

NUMBER	QTY.	NAME OF PUBLICATION	REQ	ORDER NUMBER TO PUBLISHER	TERM START DATE		PRICE UNIT	PRICE EXTENSION
		VOL 117 STARTS 05-2002						
9755543	1	PITTSBURGH TRIBUNE REVIEW /DAILY & SUNDAY/ /BY MAIL/ PID# M07502	DS	1167575	U 1 YR 05/01/2002	R	24920	24920
2081001	1	TIME - DOMESTIC ED /**/ /FOR U.S. POSSESSIONS ONLY/ /SURFACE MAIL/ CLAIMS MUST BE MADE WITHIN 12ISS OF PUBL DATE/AFTER 12ISS THE SINGLE ISSUE PRICE IS CHARGED/NO SUBS EXTENDED FOR OUT OF STOCK ISSUES MUST CLAIM BY MONTH DAY & YEAR VOL 160 STARTS 06-2002	OR	1162844	U 1 YR 06/01/2002	R	7613	7613
170770	1	USA TODAY /**/ /THE NATIONS NEWSPAPER/ /US LIBRARIES AND INSTITUTIONS ONLY/ /SURFACE MAIL/ PUBL MONDAY THRU FRIDAY EXCEPT MAJOR HOLIDAYS VOL 20 STARTS 12-2001	DA	1168380	U 1 YR 12/01/2001	R	12900	12900
170284 F	1	EL VOCERO DE PUERTO RICO	DA	1163188	U 1 YR 07/01/2002	R	25000	25000
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027751858 (00001)	1	AIR & SPACE SMITHSONIAN /**/ **BM** SUB INCLS MEMBERSHIP IN NATIONAL AIR AND SPACE MUSEUM MEMBERSHIP TITLE 8916819	1 YR	01-01-2002	2200	2200
071685002 (00002)	1	ARCHITECTURAL DIGEST /**/ /SURFACE MAIL/ **L1** **MO** 8916819 (SP)	1 YR	04-01-2002	3995	3995
083560680 (00003)	1	ARTISTS MAGAZINE /**/ **MO** 8916819 (SP)	1 YR	04-01-2002	2600	2600
107759003 (00004)	1	BASEBALL DIGEST /**/ **L1** **MO** 8916819 (SP)	1 YR	01-01-2002	2394	2394
108243007 (00005)	1	BASKETBALL DIGEST /**/ /SURFACE MAIL/ **L1** **MO** PUBL JAN FEB MAR APR MAY JUN NOV DEC 8916819 (SP)	1 YR	12-01-2002	2394	2394
124875006 (00006)	1	BLACK ENTERPRISE /**/ **MO** NONCANCELLABLE PUBLISHER WILL NOT ISSUE A REFUND FOR DUPLICATE ORDERS OF $2.00 OR LESS. 8916819 (SP)	1 YR	06-01-2002	1795	1795
125137000	1	BLACK SCHOLAR	1 YR	01-01-2002	8500	8500
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AA	DATE	DEC 20, 2001

TITLE CODE	QTY	NAME OF PUBLICATION	FOR	STARTING	★ PRICE UNIT	★ PRICE EXTENSION
(00007)		AA **L1** **QR** PUBL WITHIN SEASONS VOL 32, 2002 8916819 (SP)				
180346009 (00008)	1	CAR CRAFT MAGAZINE /**/ **MO** /INCORPS/ MUSCLE CAR REVIEW 8916819 (SP)	1 YR	06-01-2002	1500	1500
180379000 (00009)	1	CAR AND DRIVER /**/ /SURFACE MAIL/ **MO** 8916819 (SP)	1 YR	04-01-2002	2200	2200
197693005 (00010)	1	CHESS LIFE **L1** **MO** NONCANCELLABLE VOL 57, 2002 8916819 (SP)	1 YR	03-01-2002	3000	3000
210587515 (00011)	1	CIVILIZATION /DISCONTINUED EFF OCT 2000/ **BM** PUBL JAN MAR MAY JUL SEP NOV 8916819	DISCONTINUED***			
234883858 (00012)	1	CONSUMER REPORTS /**/ **IR** /INCLS/ CONSUMER REPORTS BUYING GUIDE IN DECEMBER CONSUMER REPORT PUBL MO WITH BUYING GUIDE PUBL DEC COMBINATION 8916819 (SP)	1 YR	02-01-2002	2600	2600
242696003 (00013)	1	COUNTRY SONG ROUNDUP /DISCONTINUED/ **QR** PUBL JAN APR JUL OCT 8916819	DISCONTINUED***			
254699002 (00014)	1	CYCLE WORLD /**/ /SURFACE MAIL/ **MO** /INCORPS/ CYCLE 8916819 (SP)	1 YR	05-01-2002	2200	2200

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AA DATE	DEC 20, 2001	

TITLE CODE	QTY	NAME OF PUBLICATION	FOR	STARTING	★ PRICE UNIT	★ PRICE EXTENSION
		AA				
267392298 (00015)	1	DETAILS MAGAZINE /**/ **L1** **0R** 8916819 (SP)	1 YR	03-01-2002	1500	1500
277335162 (00016)	1	DISCOVER /**/ **MO** 8916819 (SP)	1 YR	05-01-2002	2995	2995
281742510 (00017)	1	DOWN BEAT /**/ /SURFACE MAIL/ **MO** NONCANCELLABLE 8916819 (SP)	1 YR	05-01-2002	3500	3500
288308000 (00018)	1	EBONY /INCORPS/ EM /EBONY MAN MAGAZINE/ /**/ /SURFACE MAIL/ **MO** VOL 57, 2002 CANCELLATIONS ACCEPTED ONLY IN CASE OF DUPLICATE ORDERS OR CLOSING OF A SCHOOL - REQUESTS HAVE TO BE SUBMITTED PRIOR TO MAILING OF THE FIRST ISSUE 8916819 (SP)	1 YR	06-01-2002	2200	2200
314164005 (00019)	1	ESQUIRE /**/ **L1** **MO** 8916819 (SP)	1 YR	07-01-2002	1594	1594
314562000 (00020)	1	ESSENCE /**/ **MO** 8916819 (SP)	1 YR	06-01-2002	2200	2200
346909005 (00021)	1	FOOTBALL DIGEST /**/ **L1** **1R** PUBL MONTHLY WITH MAY/JUN AND JUL/AUG ISSUES COMBINED 8916819 (SP)	1 YR	02-01-2002	2394	2394
347436008 (00022)	1	FORBES /**/ **BW** /INCLS/ FORBES ASAP/ FORBES FYI/ FORBES MAGAZINE ANNUAL REPORT ON AMERICAN INDUSTRY FORBES 400 IS OCT ISS - FORBES ANNUAL DIRECTORY IS APR ISS COMBINATION	1 YR	01-01-2002	5995	5995

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		AA 8916819 (SP)				
350466009 (00023)	1	FORTUNE - DOMESTIC ED /**/ /FOR US/ **BW** 8916819 (SP)	1 YR	01-01-2002	6995	6995
374279743 (00024)	1	GQ - US EDITION /**/ /SURFACE MAIL/ **L1** **MO** 8916819 (SP)	1 YR	06-01-2002	2000	2000
389368002 (00025)	1	HEAVY METAL **BM** PUBL JAN MAR MAY JUL SEP NOV 8916819 BRI 2001	1 YR	04-01-2002	1795	1795
396467003 *(00026) F	1	HOLA /SURFACE MAIL/ **WK** PUBL ON THURSDAY 8916819 (SP)	1 YR	06-01-2002	17307	17307
455198820 (00027)	1	ISLANDS /**/ **IR** PUBL FEB MAR APR JUN AUG OCT NOV & DEC 8916819	1 YR	04-01-2002	2400	2400
462951005 (00028)	1	JET /**/ /SURFACE MAIL/ **WK** PUBL MONDAYS CANCELLATIONS ACCEPTED ONLY IN CASE OF DUPLICATE ORDERS OR CLOSING OF A SCHOOL - REQUESTS HAVE TO BE SUBMITTED PRIOR TO MAILING OF THE FIRST ISSUE 8916819 (SP)	1 YR	05-01-2002	3800	3800
464710342 (00029)	1	JOE WEIDERS MENS FITNESS /**/ /SURFACE MAIL/ **MO** NONCANCELLABLE 8916819	1 YR	01-01-2002	2197	2197
464717503 (00030)	1	JOE WEIDERS MUSCLE & FITNESS /**/ /CA/	1 YR	04-01-2002	3497	3497
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		AA **MO** NONCANCELLABLE 8916819 (SP)				
517580908 (00031)	1	LATINA /NY//**/ **MO** 8916819 (SP)	1 YR	05-01-2002	2000	2000
524472115 (00032)	1	LIBRARY OF CONGRESS ASSOCIATES MEMBERSHIP /DISCONTINUED EFF OCT 2000/ **OR** 8916819	DISCONTINUED***			
611653007 (00033)	1	NATIONAL ENQUIRER /**/ **L1** **WK** 8916819	1 YR	04-01-2002	5696	5696
612117002 (00034)	1	NATIONAL GEOGRAPHIC /**/ /FOR US & SOUTH AMERICA/ **L1** **MO** /COMES ALSO WITH/ NATL GEOGRAPHIC SOC MEMBERSHIP 8916819 (SP)	1 YR	02-01-2002	3400	3400
667791008 (00035)	1	OUTDOOR LIFE /**/ **IR** PUBL MONTHLY WITH JUN/JUL & DEC/JAN ISSUES COMBINED 8916819 (SP)	1 YR	06-01-2003	1197	1197
683727002 (00036)	1	PEOPLE WEEKLY /**/ /FOR US/ /SURFACE MAIL/ **WK** 8916819 (SP)	1 YR	07-01-2002	11395	11395
689791002 (00037)	1	PHILADELPHIA MAGAZINE /**/ **MO** /INCLS/ PHILADELPHIA MAGAZINES MID-ATLANTIC TRAVEL COMBINATION 8916819	1 YR	02-01-2002	1800	1800
698653003 (00038)	1	PITTSBURGH MAGAZINE /US ONLY/ /INCORPS/ PITTSBURGH PROSPECTS **MO**	1 YR	01-01-2002	1795	1795
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TITLE CODE	QTY	NAME OF PUBLICATION	FOR	STARTING	★ PRICE UNIT	★ PRICE EXTENSION
		AA REFUNDS ONLY GIVEN WITHIN 6 MOS ON AN 1YR SUBSCRIPTION 8916819 (SP)				
708127006 (00039)	1	POPULAR MECHANICS : 'ENGLISH EDITION /**/ **L1** **MO** 8916819 (SP)	1 YR	06-01-2002	2197	2197
708330006 (00040)	1	POPULAR SCIENCE /**/ **MO** 8916819 (SP)	1 YR	02-01-2002	1995	1995
711578062 (00041)	1	POWERLIFTING USA /FOR US/ **MO** /COMES ALSO WITH/ POWER HOTLINE 8916819	1 YR	01-01-2002	3195	3195
714240017 (00042)	1	PREMIERE /**/ /SURFACE MAIL/ **MO** 8916819 (SP)	1 YR	01-01-2002	2200	2200
715629002 (00043)	1	PREVENTION /**/ /SURFACE MAIL/ /ALL EXCEPT CANADA/ **L1** **MO** 8916819 (SP)	1 YR	01-01-2002	2197	2197
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EBSCO SUBSCRIPTION SERVICES
17-, WASHINGTON ST. FAX/201/569-0560
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ANNUAL RENEWAL LIST

STATE CORRECTIONAL INSTITUTION
PURCHASING
3001 BEAVER AVE
PITTSBURGH PA 15233

RENEWAL LIST NO.		3292 1
	ACCT NO	TN-05-5-85055-00
AA	DATE	DEC 20, 2001

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		AA				
782960009 *(00047)	1	RING /NY/ /RENEWAL ORDERS ONLY/ /SURFACE MAIL/ **BM** 8916819 (SP)	1 YR	01-01-2002	1900	1900
787046002 (00048)	1	ROLLING STONE /**/ **BW** PUBL EVERY OTHER THURSDAY CANCELLATIONS NOT ACCEPTED AFTER FIFTEEN ISSUES HAVE HAVE BEEN SERVED 8916819 (SP)	1 YR	06-01-2002	1994	1994
795330265 (00049)	1	SALUDABLE /UNABLE TO CONTACT PUBL/ **MO** 8916819				
844535005 (00050)	1	SPORTING NEWS /**/ **OR** 8916819 (SP)	1 YR	04-01-2002	7800	7800
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924034358 *(00053)	1	UPSCALE /THE SUCCESSFUL BLACK MAGAZINE/ **IR** PUBL MONTHLY WITH DEC/JAN JUN/JUL SEP/OCT ISSUES COMB 8916819	1 YR	06-01-2002	1495	1495
932769680 (00054)	1	VIBE /**/ **MO** 8916819 (SP)	1 YR	05-01-2002	1195	1195
934579004	1	VILLAGE VOICE /INCORPS/ VLG	1 YR	02-01-2002	7900	7900

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EBSCO SUBSCRIPTION SERVICES

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AA DATE	DEC 20, 2001	

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(00055)		AA **LI** **WK** VOL 47, 2002 8916819 (SP)				
955173000 (00056)	1	WHISPERING WIND **BM** PUBL FEB APR JUN AUG OCT DEC 8916819	1 YR	02-01-2002	2100	2100
981106248 (00057)	1	ZIFF DAVIS SMART BUSINESS /**/ /SURFACE MAIL/ **MO** /FORMERLY/ ZIFF DAVIS SMART BUSINESS FOR THE NEW ECONOMY 8916819 (SP)	1 YR	08-01-2002	2000	2000
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		SHIP-TO SUB-TOTAL				190497

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Newsweek

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS

POLICY STATEMENT
Commonwealth of Pennsylvania / Department of Corrections

Policy Subject: Administration of Security Level 5 Housing Units

Policy Number: 6.5.1

Date of Issue: June 8, 2000

Authority: Martin F. Horn

Effective Date: September 1, 2000

I. AUTHORITY

The authority of the Secretary of Corrections to direct the operation of the Department of Corrections is established by Sections 201, 206, and 506 of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, 71 P.S. §61, 66, and 186 as amended.

II. PURPOSE

The purpose of this policy is to establish policy and procedure for the Administration of Security Level 5 Housing Units.

III. APPLICABILITY

This policy is applicable to all facilities within the Department of Corrections that operate a Security Level 5 Housing Units (e.g. Restricted Housing Unit [RHU], Special Management Unit [SMU], and Long Term Segregation Unit [LTSU])

IV. DEFINITIONS

A. Administrative Custody (AC)

A housing status to which inmates are assigned for non-disciplinary reasons but requires closer supervision and control than is generally available in general population.

B. Custody Level 5 (CL 5)

A classification level to which inmates are assigned who have demonstrated, through a pattern of escapes or attempted escapes, maladjustive or assaultive behavior, or through a need for protection that they require a high degree of structure.

C. Custody Level 5H (CL 5H)

A custody level assigned to inmates who fail to complete the Special Management Unit program or who may be deemed of having serious behavioral problems and a high potential for repeating that behavior. Inmates with this classification are not viewed as viable candidates for release to general population, due to the following:

1. they are a serious escape risk;

2. they have demonstrated assaultive behavior with the intent to cause death or serious bodily injury;

3. they have inflicted injury to staff and/or inmates;

4. they have engaged in a facility disturbance(s);

5. they have been, or are in the possession of, weapons and/or implements of escape;

6. they have a recorded history of:

    a. having or exerting negative influence in facility activities;

    b. being a member of a Security Threat Group or other unauthorized organization(s) as outlined in Department policy 6.3.1, "**Facility Security**"; and/or

    c. being a sexual predator.

D. Disciplinary Custody (DC)

A housing status to which inmates are assigned, via sanction imposed by a Hearing Examiner, upon being found guilty of a Class I misconduct.

E. General Population

A housing status to which the majority of inmates are assigned who are not housed within a Restricted Housing Unit, Special Management Unit, Capital Case Unit, Mental Health Unit, Long Term Segregation Unit, Medical Infirmary, or Diagnostic Unit of a particular facility.

F. Long Term Segregation Unit (LTSU)

A housing unit or group of cells designated to house inmates classified as Custody Level 5H.

G. Restricted Housing Unit (RHU)

A housing unit or group of cells designated to house inmates assigned to AC/DC status.

H. Security Level 5, Maximum

Maximum security housing consisting of single or double occupancy cells with a secure control booth that has remote electronic locking capabilities.

I. Special Management Unit (SMU)

A housing unit or group of cells designated to house inmates who are, or have been, disruptive or violent.

All other pertinent definitions are contained in the procedure manual for this policy.

V. POLICY

It is the policy of the Department to maintain Security Level 5 Housing Units in order to maintain the secure and orderly operation of the facility and to provide for the safety of the public, staff, and other inmates. A Security Level 5 Housing Unit is generally a Restricted Housing Unit (RHU), a Special Management Unit (SMU), or a Long Term Segregation Unit (LTSU).

VI. PROCEDURES

1. All L5 receptions will be provided with a copy of the unit's inmate handbook within one (1) hour after reception or as soon thereafter as possible. The handbook shall be readily available in both English and Spanish. If other language(s) are required, copies will be obtained and issued on an as needed basis.

2. Each inmate is required to sign for a numbered copy of the handbook and it will remain the property of the unit.

3. Each unit handbook shall contain the unit's rules and regulations and information pertaining to the units:

a. daily and special routines;

b. rules and regulations;

c. management phases and progression (SMU and LTSU only);

d. guidelines for disciplinary time reductions;

e. types and frequency of inspections; and

f. general and miscellaneous information.

4. The handbook shall be reviewed/revised at least annually by the Deputy Superintendent for Facilities Management/Deputy Superintendent for Internal Security and Major-of-the-Guard.

5. Inmates shall return the unit handbook when they are released.

6. All operational procedures are contained in the procedure manual for this policy.

7. All pertinent terms are contained in the glossary of terms section of the procedure manual for this policy.

VII. SUSPENSION DURING AN EMERGENCY

In an emergency or extended disruption of normal facility operation, the Secretary, or designee may suspend any provision or section of this policy, for a specific period.

VIII. RIGHTS UNDER THIS POLICY

This policy does not create rights in any person nor should it be interpreted or applied in such a manner as to abridge the rights of any individual. This policy

should be interpreted to have sufficient flexibility so as to be consistent with law and to permit the accomplishment of the purpose(s) of the policies of the Department of Corrections.

IX. RELEASE OF INFORMATION AND DISSEMINATION OF POLICY

A. Release of Information

1. Policy

This policy document is public information and may be released to members of the public, staff, legislative, judicial, law enforcement and correctional agencies and/or inmates upon request.

2. Procedure Manual (if applicable)

The procedure manual for this policy is not public information and shall not be released in its entirety or in part, without the prior approval of the Secretary of Corrections or designee. This manual or parts thereof, may be released to any Department of Corrections employee on an as needed basis.

B. Distribution of Policy

1. General Distribution

The Department of Corrections' policy and procedure manuals (when applicable) shall be distributed to the members of the Central Office Executive Staff, all Facility Managers, and Community Corrections Regional Directors on a routine basis. Distribution to other individuals and/or agencies is subject to the approval of the Secretary of Corrections or designee.

2. Distribution to Staff

It is the responsibility of those individuals receiving policies and procedures, as indicated in the "General Distribution" section above, to ensure that each employee expected or required to perform the necessary procedures/duties is issued a copy of the policy and procedures.

X. SUPERSEDED POLICY AND CROSS REFERENCE

A. Superseded Policy

1. Department Policy

a. 6.5.1, Administration of Restricted Housing Units, issued July 20, 1993, by former Secretary Joseph D. Lehman.
b. 6..5.1-1, Administration of Restricted Housing Units, issued August 1, 1995, by Secretary Martin F. Horn.
c. 6.5.1-2, Administration of Restricted Housing Units, issued October 2, 1995, by former Executive Deputy Secretary Raymond E. Clymer, Jr.,
d. 6.5.1-3, Administration of Restricted Housing Units, issued November 27, 1995, by Secretary Martin F. Horn.
e. 6.5.1-4, Administration of Restricted Housing Units, issued April 28, 1997, by Secretary Martin F. Horn.
f. 6.5.1-5, Administration of Restricted Housing Units, issued June 10, 1998, by Secretary Martin F. Horn.
g. 6.5.1-6, Administration of Restricted Housing Units, issued August 27, 1998, by Secretary Martin F. Horn.
h. 6.5.1-7, Administration of Restricted Housing Units, issued January 29, 1999, by Secretary Martin F. Horn.

i. 6.5.1-8, Administration of Restricted Housing Units, issued May 17, 1999, by Secretary Martin F. Horn,
j. 6.5.1-9, Administration of Restricted Housing Units, September 17, 1999, by Secretary Martin F. Horn,
k. 6.5.2, Staff Assignments to the Restricted Housing Units/Selection and Monitoring, issued November 7, 1983, by former Secretary Glen R. Jeffes,
l. 6.5.2-1, Staff Assignments to the Restricted Housing Units/Selection and Monitoring, issued January 12, 1999, by Secretary Martin F. Horn,
m. 6.5.4, Use of Video Tapes for RHU/SMU Receptions, issued May 28, 1999, by Secretary Martin F. Horn,
n. 6.5.7, Special Management Unit policy issued June 15, 1994 by former Secretary Joseph D. Lehman,
o. 6.5.7-1, Special Management Unit bulletin issued February 17, 1998 by Secretary Martin F. Horn,
p. 6.5.7-2, Special Management Unit bulletin issued August 27, 1998 by Secretary Martin F. Horn,
q. 6.5.7-3, Special Management Unit bulletin issued February 5, 1999 by Secretary Martin F. Horn,
r. 6.5.7-4, Special Management Unit bulletin issued February 5, 1999 by Secretary Martin F. Horn,
s. 6.5.7-5, Special Management Unit May 17, 1999 issued by Secretary Martin F. Horn,
t. 6.5.7-6, Special Management Unit September 17, 1999 issued by Secretary Martin F. Horn.

2. Facility Policy and Procedures

This document supersedes all facility policy and procedures on this subject.

B. Cross Reference(s)

1. Administrative Manuals

a. DC-ADM 007, Access to Provided Legal Services
b. DC-ADM 201, Use of Force and Restraints
c. DC-ADM 203, Searches of Inmates and Cells
d. DC-ADM 610, Food Services
e. DC-ADM 801, Inmate Discipline
f. DC-ADM 802, Administrative Custody Procedures
g. DC-ADM 803, Inmate Mail and Incoming Publications
h. DC-ADM 804, Consolidated Inmate Grievance Review System
i. DC-ADM 807, Inmate Hygiene and Grooming
j. DC-ADM 815, Commissary Privileges
k. DC-ADM 816, Inmate Compensation System
l. DC-ADM 818, Automated Inmate Telephone System
m. DC-ADM 820, for Medical Services Co-Pay
n. 6.3.1, Facility Security
o. 6.3.12, Drug Interdiction
p. 6.6.2, Authorized Defensive Weapons and Equipment
q. 6.7.1, Emergency Preparedness
r. 7.2.1, Counseling Services
s. 7.3.1, Delivery of Mental Health Procedures
t. 11.7.1, Bed Management, Transfer Petition, and Transportation Systems
u. 13.1.4, Refusal to Eat and/or Take Liquids
v. 13.2.3, Access to Health Care
w. 13.4.1, Pharmacy Guidelines

C. ACA Standards

1. Administration of Correctional Agencies: N/A

2. Adult Correctional Institutions: 3-4128, 3-4129, 3-4131, 3-4132, 3-4133, 3-4134, 3-4136, 3-4139, 3-4144, 3-4145, 3-4146, 3-4244, 3-4245, 3-4246, 3-4247, 3-4248, 3-4250, 3-4251, 3-4252, 3-4253, 3-4254, 3-4256, 3-4257, 3-4261, 3-4301, 3-4319, 3-4321, 3-4325

3. Adult Community Residential Services: N/A

4. Adult Correctional Boot Camp Programs: N/A

5. Correctional Training Academies: N/A

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS

POLICY STATEMENT
Commonwealth of Pennsylvania / Department of Corrections

Policy Subject: Administration of Security Level 5 Housing Units

Policy Number: 6.5.1

Date of Issue: June 8, 2000

Authority: Martin F. Horn

Effective Date: September 1, 2000

Release of Information:

Policy Document: The Department of Corrections' policy document on this subject is public information and may be released to members of the public, staff, legislative, judicial, law enforcement and correctional agencies and/or inmates upon request.

Procedure Manual: This Procedure Manual is **not public information** and **shall not be released** in its entirety or in part, without the prior approval of the Secretary of Corrections or designee. This manual or parts thereof, may be released to any Department of Corrections employee on an as needed basis.

Procedure Development: All required procedures shall be developed in compliance with the standards set forth in this manual and/or the governing policy. These standards may be exceeded, but in all cases these standards are the minimum standard that shall be achieved. In the event a deviation or variance is

required, a written request shall be submitted to the appropriate Regional Deputy Secretary and the Standards and Practices Unit for review and approval prior to implementation. Absent such approval, all procedures set forth in this manual shall be met.

6.5.1, Administration of Security Level 5 Housing Units
Procedure Manual
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Section 1 – Administration

A. Purpose

1. Restricted Housing Unit (RHU)

The primary purpose of an RHU is to securely house inmates who while in general population received disciplinary sanctions in accordance with Department policy **DC-ADM 801, "Inmate Discipline"** or who have been placed in Administrative Custody in accordance with **DC-ADM 802, "Administrative Custody Procedures."**

2. Special Management Unit (SMU)

The primary purpose of an SMU is to securely house inmates who exhibit behavior that is continually disruptive, violent, dangerous or a threat to the orderly operation of their assigned facility. Further, these inmates may have been repeatedly subject to disciplinary action or investigation(s). The unit is specifically designed to provide each inmate with the opportunity to demonstrate a stable level of behavior so they can be safely returned to general population or another suitable status.

3. Long Term Segregation Unit (LTSU)

The primary purpose of a LTSU is to securely house the extremely disruptive, violent and problematic inmates. Inmates placed in a LTSU shall have demonstrated an inability or unwillingness to conform to the requirements of general population. In addition, inmates who have continually manifested a negative influence on the safety and security of the PA Department of Corrections, have not suitably progressed in an SMU, or may have reportedly perpetuated criminal activity that threatens the community may be transferred to a LTSU. Each LTSU

shall provide extremely high levels of security and sharply reduce the privileges permitted.

B. Physical Plant

1. General

Each Security Level 5 Unit shall be constructed or equipped with:

a. maximum security constructed cells, furnished with a toilet, wash basin with hot/cold water, desk, stool, and bunk with a fire retardant, sanitizable mattress;[1]

b. fixtures and furniture that are permanently fastened and constructed of high security grade materials;

c. lockable cell door apertures;

d. lights and water controlled from outside the cell; and

e. appropriate devices to prevent inmates from throwing items at staff (i.e., screening, door shields, etc.).

2. Recreation Areas

Each Security Level 5 Unit shall have individual exercise yards that meet the following specifications:

a. Be constructed with 10' or 12' high 6 gauge chain link fencing;

b. have a covered top of 9 gauge chain link fencing;

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[1] 3-4128, 3-4129, 3-4131, 3-4132, 3-4133, 3-4136

c. have razor ribbon on the roof and yard fences;

d. have gates with lockable apertures through which inmates can be cuffing/uncuffed; and

e. have gates that are of a sufficient security grade to contain maximum security inmates.

3. Storage Areas

Each Security Level 5 Unit shall provide adequate storage areas for:

a. inmate property;

b. supplies; and

c. emergency equipment.

4. Shower Facilities

Each Security Level 5 Unit shower shall:

a. be lockable;

b. be equipped with a lockable aperture through which inmates can be cuffing/uncuffed;

c. have water and lights controlled from outside; and

d. have secure plumbing and lighting fixtures.

* * * * *

8. Property Control

a. The Unit Manager/Officer-in-Charge shall assign a Unit Officer as the Unit's Property Officer. This officer shall be responsible for inventory, control,

securing, receiving, and issuing of all inmate property. An alternate may also be named. However, all Unit staff shall ensure that the property control procedures are followed.

b. When an inmate is placed in the L5 Unit, the receiving L5 Unit Officer or the Unit Property Officer shall inventory all personal property. All prohibited property shall be confiscated and marked with the inmate's name, number and housing unit he/she was received from, inventoried and a **DC-153, Personal Property Inventory** completed and the property stored in a designated area. The inmate shall be issued a copy of the **DC-153, Personal Property Inventory**. The **DC-154A, Confiscated Items Receipt** shall be properly completed and a copy issued to the inmate for all those items denied to him/her by the Corrections Officer conducting the inventory.

c. Each inmate shall receive the approved items for his/her status (basic issue, legal materials, etc.) from his/her property; he/she shall not be permitted access to his/her other property except for regulated legal materials or for items approved by PRC.

d. While housed in the L5 Unit, inmates shall not be permitted to retain personal property, except as approved by the Unit Management Team or PRC and/or as provided in this manual.

e. The property shall be stored in the property room located within the unit, logged in the property log, properly labeled, and placed on appropriate shelving.

f. Upon being released back to general population, staff, in the presence of the inmate, shall remove

and check the inmate's remaining property from storage and return it to the inmate. Any discrepancies or breakage shall be documented and forwarded to the appropriate staff. The inmate shall sign the **DC-153, Personal Property Inventory** for all property received.

g. Property may be confiscated through misconduct procedures from any L5 Unit inmate who is abusing the property or fashioning it in such a way that it provides a threat to security or safety. The decision shall be made by the Unit Manager/Officer-In-Charge and/or Shift Commander and reviewed by the Unit Management Team and PRC. In addition, further disposition shall be made by the Hearing Examiner on the misconduct report.

h. Inmates housed in the L5 Unit may request a legal pack, (a reasonable amount of paper, carbon paper and a flex pen) for the purpose of preparing legal documents. The Unit Manager/Officer-In-Charge shall permit the inmate to order the required items through the commissary. If the inmate is indigent, the Unit Manager/Officer-In-Charge shall notify the Corrections Librarian who shall supply the necessary items. The L5 Unit Lieutenant/Sergeant shall issue the inmate a security pen. Upon issuance of the pen, it shall be logged on the **DC-17X, Adjustment Record For Security Level 5 Inmates**. During routine cell inspections and searches, the officers are to note the condition of the pen.

* * * * *

E. Assignment of Inmates

1. RHU

Inmates shall be assigned to the RHU in accordance with Department policy, **DC-ADM 801, "Inmate Discipline"** or **"DC-ADM 802, "Administrative Custody Procedures."**

2. SMU

1. Inmates assigned to an SMU are those who exhibit behavior that is continually disruptive, violent, dangerous or a threat to the orderly operation of their assigned facility. Further, these inmates may have been repeatedly subject to disciplinary action or investigations.

2. The following inmates shall generally be excluded from assignment to an SMU:

(1) protection/self-confinement cases;
(2) inmates with a major psychiatric disorder (Axis I), excluding drug and/or alcohol diagnoses;
(3) inmates whose behavior has been, or is, a risk of escape or a threat to others or the facility as a whole, and that placement in general population nor RHU would not currently be appropriate.
(4) developmentally disabled inmates; and
(5) physically disabled inmates.

3. LTSU

a. Any inmate who is, has, or may be planning to engage in the following activities may be appropriate for assignment in the LTSU:

(1) inmates who fail to complete SMU;
(2) serious escape history;
(3) assaultive behavior with the intent to cause death or serious bodily injury;

(4) injury to staff and/or inmates;
(5) engaging in facility disturbance(s);
(6) recorded history of having or exerting negative influence in facility activities;
(7) Security Threat Group (STG) member, or other unauthorized organization(s);
(8) Perpetuated criminal activity that threatens the community;
(9) a history of being a sexual predator; and/or
(10) possessing weapons and/or implements of escape.

b. The authority to request an inmate's classification as a CL 5H rests with the Facility Manager of the referring facility.

c. The authority to approve or disapprove classification as a CL 5H shall rest with the Executive Deputy Secretary or designee. This shall include the authority to verbally approve a placement under extenuating or emergency circumstances. The submission of an automated transfer request and a completed referral packet shall still be required.

d. Upon final approval of the classification, coordination of the actual placement shall be the responsibility of the Diagnostic Classification Coordinator's office.

* * * * *

1. RHU

All inmates confined in the RHU shall be handled in accordance with **DC-ADM 801, "Inmate Discipline"** and **DC-ADM 802, Administrative Custody Procedures."**

2. SMU

SMU shall be given the opportunity to progress through specific phases within the SMU based upon their behavior and ability to adjust under reduced levels of supervision. Each phase shall offer progressively more privileges and services. Movement between phases is based upon the inmate meeting certain criteria. Inmates received in Disciplinary Custody shall begin at Phase 5; inmates received in Administrative Custody shall begin at Phase 4. **Attachment A** provides an overview of the privileges associated with each Phase.

a. Phase 5

This phase is the starting point for inmates in disciplinary custody. Inmates shall stay in this phase until the expiration of their DC time or until the PRC grants them an early release from DC status. In-cell educational programs may be approved by PRC.

b. Phase 4

This phase is the starting point for all inmates transferred to the SMU in AC status and inmates in Phase 5 who have completed their DC time. These inmates shall receive the privileges and services established by Department policy **DC-ADM 802, "Administrative Custody Procedures."** In-cell educational and activities programs may be approved by the PRC.

c. Phase 3

Inmates progress to this phase from Phase 4 as set forth in **Section 1.2** below. Inmates in this phase remain in AC status, but are eligible for privileges and services in addition to those established in **DC-ADM 802, Administrative Custody Procedures."** In this phase, in-cell programming shall be increased to allow

the inmate supervised cell study programs from the Education and Activities Departments.

d. Phase 2

Inmates in this phase also remain in AC status. This is the first time that inmates are permitted out of their cells without restraints individually or in small groups no greater than four (4) inmates. This shall include group counseling, small group yard activities, educational classes, and block out. As inmates progress in this phase, they may be assigned to block workers or janitors. The number of staff needed to provide proper control and supervision of the group shall be determined by the Unit Management Team.

e. Phase 1

Phase 1 is a probationary period in general population in the inmate's designated facility. This probationary period shall last at least 90 days and may be extended to as long as 180 days by Unit Management Team using the inmate staffing review process. All inmates on SMU Phase 1 probation shall retain "Z" and "O" program codes. These program codes may be removed by unit management team staffing only after completion of the probationary period.

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3. LTSU

Inmates in the LTSU may be changed from one level to another as follows:

a. Inmates in all levels shall be personally reviewed every 30 days by the LTSU Management Team in order to monitor progress and to evaluate any potential for advancement to the next. The Unit

Management Team shall develop a new **DC-43, Prescriptive Program Plan** at that time level.

b. The following factors shall be considered prior to advancement to the next level:

(1) time in level;

(2) continued facility risk;

(3) number, type, and frequency of misconducts;

(4) involvement in self-improvement activities;

(5) unit behavior and housing reports, to include:

(b) quarters sanitation;

(c) personal hygiene and grooming;

(d) response to verbal and written orders;

(e) response to authority;

(f) interaction with other inmates;

(g) completion of specific goals as set by Unit Management Team;

(h) work performance; and

(i) demeanor with staff on the block and at periodic reviews.

* * * * *

b. RHU

All mail for inmates in the RHU shall be in accordance with Department policy **DC-ADM 803, "Inmate Mail and incoming Publications."**

c. SMU

(1) Receipt of mail should be based on each inmate's phase, and is considered to be a privilege.

(a) Phase 5 - legal, personal, ten (10) photographs, and one (1) newspaper (each newspaper shall be issued as a one (1) for one (1) exchange).

(b) Phase 4 - legal, personal, ten (10) photographs, one (1) magazine, and one (1) newspaper (each newspaper shall be issued as a one (1) for one (1) exchange).

(c) Phase 3 - legal, personal, ten (10) photographs, ten (10) magazines, and one (1) newspaper (each newspaper shall be issued as a one (1) for one (1) exchange).

(d) Phase 2 - same as Phase 3.

(e) Phase 1 - same mail privileges as general population.

(2) The Unit Management Team may authorize additional mail privileges, as part of the inmate's **DC-43, "Prescriptive Program Plan,"** as reinforcement for the inmate's completion of specific goals within specified timeframes.

d. LTSU

(1) Receipt of mail shall be based on each inmate's phase, and is considered to be a privilege.

(a) Level 2 – Legal/personal correspondence.
(b) Level 1 Legal/personal correspondence, one (1) newspaper and five (5) magazines. Each newspaper shall be issued as a one (1) for one (1) exchange.

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K. Special Services

1. Telephone Privileges

a. RHU

Inmates shall be permitted telephone calls in accordance with Department policy **DC-ADM 801, "Inmate Discipline"** and **DC-ADM 802, "Administrative Custody Procedures."**

b. SMU

(1) While confined in the SMU, inmates are permitted emergency telephone calls only until progressing to Phase 3.

(2) Inmates in Phase 3 may be permitted one (1) telephone call per month. Inmates in Phase 2 may be permitted one (1) telephone call every two (2) weeks (or two [2] in a month.)

(3) The Unit Management Team may authorize additional telephone privileges, as part of the inmate's Prescriptive Program Plan, as reinforcement for the inmate's completion of specific goals within specified timeframes.

(4) The Unit Manager shall deal with emergency telephone calls on a case-by-case basis. All situations that may warrant an emergency call shall be verified.

(5) In the event of a request for an emergency telephone call when the Unit Manager is not available, an emergency call for a serious illness or death of a family member may be authorized by the Facility Manager, Deputy Superintendents, PRC, Major, or the Shift Commander.

(6) All telephone calls shall be limited to fifteen (15) minutes in duration and shall be made collect from the inmate telephone in the unit pursuant to Department policy **DC-ADM 818, "Automated Inmate Telephone System."**

2. Basic Issue, Hygiene Items, and Commissary

a. Inmates confined in a L5 Unit shall be issued the following items:

1 jumpsuit
1 blanket
3 pairs of socks
3 undershorts (males)
3 panties (females)
3 undershirts (males and females
3 bras (females)
2 sheets
1 pillowcase
1 pair slip on canvas shoes
1 bar of soap
1 grievance form**
1 copy of the unit handbook
1 flex-toothbrush
1 toothpaste
1 washcloth
1 toilet paper
writing paper **
carbon paper **
up to 10 postage paid envelopes
1 request slip**
1 flex-pen**
1 comb**

b. Special items falling in the category of personal hygiene such as: denture items, prescription eyeglasses, combs, feminine hygiene products, etc. shall generally be permitted unless a

security concern is evident. Any such request shall be addressed to the Unit Manager/Officer-In-Charge for review.

c. Accumulation of the article listed above may be restricted when it affects security, health, sanitation, or safety. No articles or items are permitted that are composed entirely or in part of glass or metal, this includes lids as well as containers. Items that are not on the above list shall be approved by the Unit Manager before they shall be permitted in the inmate's possession.

3. Commissary

a. General

(1) When permitted, all commissary purchases shall be consistent with **DC-ADM 801, "Inmate Discipline," DC-ADM 802, "Administrative Custody Procedure**, and **DC-ADM 815, "Commissary Privileges."**

(2) Each facility shall develop a separate commissary list (order form) for inmates in L5 status.

(3) DC status inmate purchases shall be limited to approved commissary items for personal hygiene (excluding razors), underwear, items needed for personal/legal correspondence (excluding pens/pencils). All tobacco products are prohibited.

(4) AC status inmate purchases shall be limited to items that have not been identified as safety/security items by the Deputy Superintendent for Facilities

Management/Deputy Superintendent for Internal Security.

(5) If possible and practical, the facility shall provide an alternate item, or an appropriate procedure as a substitute for restricted items. For example, a "flex-pen" may be issued instead of a pen/pencil.

(6) Officers shall not pass commissary items from one inmate to another.

(7) Inmates are not permitted to retain any of the paper/plastic bags used to transport commissary.

b. RHU

Commissary privileges for RHU inmates shall be in compliance with the general procedures listed above.

c. SMU

Commissary privileges for the SMU inmates shall be in compliance with the general procedures listed above and:

(1) Phase 2 inmates are permitted to purchase a radio and/or television; Phase 3 inmates are permitted to purchase a radio only, upon approval of the Unit Manager. Earphones are required for both televisions and radios.

(2) The following additional articles are permitted for Phases 2 and 3:

greeting cards
legal envelopes
loose leaf paper
notebook (composition type, no metal)

Writing tablet
edible commissary
newspaper (not over one week old)
magazines (no more than 10);
hard or soft back dictionary
wedding band
legal and religious materials that fit in one (1) records center box

(3) Phase 2 inmates are permitted to purchase up to $20.00 of commissary items per week. Phase 3 inmates are permitted to purchase up to $10.00 of commissary items per week. Neither Phase 2 or Phase 3 inmates may purchase articles of clothing. Commissary privileges may be revoked by the Unit Management Team or PRC if abused by the inmate.

(4) The Unit Management Team may authorize additional personal property/commissary privileges, as part of the inmate's **DC-43, Prescriptive Program Plan** as reinforcement for the inmate's completion of specific goals within specified timeframes.

d. LTSU

Commissary privileges for the LTSU inmates shall be in compliance with the general procedures listed in **Section a** above and shall be limited to five dollars ($5.00) per week.

4. Barber/Cosmetology Services

a. All inmates are required to maintain grooming standards in accordance with Department policy **DC-ADM 807, "Inmate Hygiene and Grooming."**

b. All inmates shall be eligible for a haircut once each 30 days or as provided for inmates in general population. A haircut may be provided prior to the first 30 days being served if necessary, to ensure that the inmate is in compliance with the **DC-ADM 807,**

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(3) Use of the mini law library may be denied if there is an immediate security concern.

(4) The Unit Manager/Officer-In-Charge or designee shall maintain a log to record inmate use of the library, including name, number, date, and length of time the library was used.

(5) The facility librarian shall inventory and update the unit's mini law library on a weekly basis.

(6) An inmate shall only be permitted to assist or be assisted by other inmates as approved by the Unit Manager/Officer-In-Charge or designee.

(7) the inmate and all reference materials shall be searched before going to and upon leaving the library.

8. Visits

a. Frequency

(1) RHU

The frequency of visits for each RHU inmate shall be determined by his/her custody status.

(a) DC status inmates shall be permitted one (1) visit per month with immediate family.

(b) AC status inmates shall be permitted one (1) visit per week with immediate family.

(c) RHU visits shall be permitted Monday through Friday. No weekend, holiday, or extended visiting hours are permitted.

(d) All visits are restricted to a maximum of one (1) hour.

(2) SMU

The frequency of visits for each SMU inmate shall be determined by his/her management Phase.

(a) SMU Phase 5 - non-contact, one (1) per month, immediate family only.

(b) SMU Phase 4 - non-contact, one (1) per week, and a maximum of 2 weekend or holiday visits per month

(c) SMU Phase 3 - non-contact, one (1) per week, and a maximum of 2 weekend or holiday visits per month.

(d) SMU Phase 2 - non-contact, one (1) per week, and a maximum of 3 weekend or holiday visits per month.

(e) SMU Phase 1 - non-contact, same number of visits as general population.

(f) The Unit Management Team may authorize additional visiting privileges, as part of the inmate's **DC-43, Prescriptive Program Plan** as

reinforcement for the inmate's completion of specific goals within specified timeframes.

(g) All visits shall be a minimum of one (1) hour.

(3) LTSU

The frequency of visits for each LTSU inmate shall be determined by his/her management Level.

(a) LTSU Level 2 – One (1) non-contact weekday visit (of at least one (1) hour) is permitted per month with immediate family only. No holiday visits are permitted.

(b) Level 1 – Two (2) non-contact weekday visits (of at least one (1) hour) per month with any approved visitor is approved.

(c) The Unit Management Team may authorize additional visiting privileges, as part of the inmate's **DC-43, Prescriptive Program Plan** as reinforcement for the inmate's completion of specific goals within specified timeframes

b. General Procedures

(1) All L5 visits shall be non-contact and under direct/constant visual observation of a Corrections Officer.

(2) All L5 visits shall be conducted in the unit, if a visiting area is available, or in another location with securable a non-contact area(s).

(3) The number of visitors permitted at any given time is limited to 2. This may be two (2) adults or one (1) adult and one (1) child under the age of eighteen (18.) The Unit Manager and/or Shift Commander has the discretion to permit

additional visitors such as small children and/or infants on a case-by-case basis.

(4) All L5 inmates, regardless of Custody status, Phase or Level, may receive non-contact visits from legal counsel. Legal visits shall not be limited in number or frequency absent security concerns, and then only upon the Facility Manager's approval following consultation with the Department's Office of Chief Counsel.

(5) The inmate shall be escorted to and from visits by unit Officers or Corrections Officers assigned by the Shift Commander/designee.

(6) Failure to comply with all rules and regulations during visits by the inmate or his/her visitor(s) shall result in the termination of the visit.

(7) Personal items, such as handbags are not permitted, nor is smoking permitted by the inmate or the visitor in the visiting area. No food items are permitted.

(8) Appropriate restraints shall remain on the inmate while the inmate is in the visiting area.

(9) The visit shall be kept under constant observation by the assigned Officer.

(10) All visitors are required to present identification and are subject to the use of hand held metal detectors, electronic drug detection devices, etc in accordance with Department policy **DC-ADM 812 "Inmate Visiting Privileges."**

(11) Visitors who fail to act in compliance with visiting privilege guidelines shall have the visit terminated.

(12) Visits shall be limited on a first come, first served basis.

(13) When notified of a visit, the unit Officer shall inform the inmate, allow him/her time to prepare for the visit. The Escorting Officer shall ensure that the inmate is properly dressed and restrained.

(14) Once in the visiting area, the inmate shall be transferred to the custody of the Visiting Officer(s) until the visit is concluded. Once the visit is concluded, the Visiting Officer shall notify the Unit Control Booth and the inmate shall be returned to the cell.

9. Religious Privileges

a. The facility's Chaplains are responsible for tending to each inmate's religious needs, provided that such services do not infringe upon the security precautions of the unit. The Chaplaincy Department may provide religious items to the inmates with the approval of the Unit Manager/Officer-In-Charge and in accordance with Department policy **DC-ADM 819, "Religious Activities."**

b. Inmates confined in a L5 Unit are not permitted to attend religious services in the Chapel. Inmates in a L5 Unit shall be visited by a Facility Chaplain on a daily basis, when available, and weekly by a Chaplain of the inmate's faith, if available. All Chaplains entering/existing the unit shall sign in/out in the **DC-702, Security Level 5 Housing Unit Visitors Log**. Entries shall also be made by unit staff in the log book and daily report documenting the visit.

c. Each inmate shall be permitted to retain religious materials, that along with any legal materials, shall fit in the one (1) records center box. Approved religious materials are any written documents that are reasonably related to religion. Any questions

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	RHU	SMU	LTSU
Activities	In Cell	Phase 5, 4 and 3-In Cell Phase 2 in Small Groups	← Same as RHU
Commissary	DC Status – Toilet Articles AC-Status- In accordance with AC Commissary List **No Tobacco products permitted.**	Phases 5 and 4-Writing Materials Only Phase 3 -$10 per week (no clothing) Phase 2 -$20 per week (no clothing) **No Tobacco products permitted.**	Level 2 - None Level 1-$5 per week **No Tobacco products permitted.**
Compensation	As per DC-ADM 816, Inmate Compensation System	← Same as RHU	← Same as RHU
Counseling Services	In Cell Visits by Counselor	Phases 5, 4 and 3-In Cell Visits by Counselor Phase 2 / Small Group in Unit	← Same as RHU
Educational Services	Both Status-In cell as approved by PRC	All Phases –In cell as approved by Unit Team Phase 2-Small Group in Unit	Level 2-In cell study (GED and Special Ed, if approved) Level 1-None
Employment	DC Status-Unit Janitor (if no AC available) AC Status-Unit Janitor	Phases 5 and 4 -None Phase 3-Unit Janitor (if no phase 2 available) Phase 2-Unit Janitor	Level 2-Unit Janitor (if no Level 1 available) Level 1-Unit Janitor
Exercise	1 Hour – 5 Days a Week	← Same as RHU	← Same as RHU
Laundry	Twice per week	← Same as RHU	← Same as RHU
Legal-Religious Materials	Contents of 1 Records Center Box	← Same as RHU	← Same as RHU
Library Services	Recreational books from library. Mini law library on unit.	← Same as RHU	← Same as RHU
Mail-Incoming Publications	Legal/Personal Correspondence as per DC-ADM 803, Inmate Mail and Incoming Publications	Phase 5- 1 Newspaper, 10 Photos Phase 4- 1 Newspaper, 10 Photos, 1 Magazine Phase 3- 1 Newspaper, 10 Photos, 10 Magazines Phase 2- Same as Phase 3	Level 2- Legal/Personal Correspondence Level 1- Legal/Personal Correspondence, 1 Newspaper, 5 Magazines
Medical-Dental	In Unit Screening	← Same as RHU	← Same as RHU
Mental Health	In Unit Screening	← Same as RHU	← Same as RHU
Property	AC/DC Status -Toilet Articles, Shower Shoes, Eyeglasses, Dentures	All Phases - Shower Shoes, Dictionary, Eyeglasses, Dentures	Both Levels-Shower Shoes, Dictionary, Eyeglasses, Dentures
Radio-Television	DC Status – None AC Status- As approved by PRC	Phases 5 and 4-None Phase 3-Radio only Phase 2-Radio and Television	Level 2-None Level 1-None
Religious Activities	In Cell Visits by Chaplain	← Same as RHU	← Same as RHU
Showers	Three (3) per week	← Same as RHU	← Same as RHU
Telephone Calls	DC Status As per DC-ADM 801, Inmate Discipline AC Status As per DC-ADM 802, Administrative Custody Procedures	Phase 5-and 4-Emergency Only Phase 3-One per month Phase 2-One every 2 weeks	Level 2- Emergency Only Level 1-1 per month
Visits Ap Non-Contact	DC Status-1/month immediate family AC Status-1/week	Phase 5-1/month immediate family Phases 4 & 3- 1/week and 2 weekend/holiday a month Phase 2-1/week and 3 weekend/holiday a month	Level 2-1 per month immediate family Level 1-2 per month immediate family

COMMONWEALTH OF PENNSYLVANIA
POLICY STATEMENT
DEPARTMENT OF CORRECTIONS

Commonwealth of Pennsylvania
Department of Corrections

Policy Subject: Capital Case Administration

Policy Number: 6.5.8

Date of Issue: July 30, 1997

Authority: Martin F. Horn

Effective Date: July 30, 1997

I. AUTHORITY

The Authority of the Commissioner of Corrections to direct the operations of the Department of Corrections is established by Sections 201, 206, 506, and 901-B of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, No. 175, as amended.

II. PURPOSE

The purpose of this directive is to set forth policy and procedures for:

A. Standardizing the administration of Capital Case status inmates;
B. Delivering of an appropriate array of program opportunities for Phase I Capital Case inmates;
C. Providing for access to legal materials by Capital Case inmates;
D. Standardizing the duties and responsibilities for those staff assigned to the care and custody of Capital Case status inmates;

E. Designating the number and qualifications of personnel who will carry out executions;
F. Handling news media coverage of executions; and
G. Providing the opportunity for the interaction between registered victim and the Office of the Victim Advocate.

III. APPLICABILITY

This policy is applicable to all persons employed by the Department of Corrections and to those individuals and groups who have business or use the resources of the Department.

IV. DEFINITIONS

The definitions of terms pertaining to this policy are included in the Capital Case Manual.

POLICY

It is the policy of the Department of Corrections to:

A. Administer all Capital Cases in a secure and humane manner consistent with applicable law;

B. Ensure that all Phase I Capital Case inmates are governed by the same general policies applicable to all Administrative Custody inmates with the few exceptions described in specific policies;

C. Ensure that all Phase I Capital Case inmates in Administrative Custody status have access to educational and leisure programs;

D. Make appropriate provisions allowing Capital Case inmates in Phase I and/or Phase II access to legal materials;

E. Provide a safe, secure and humane process of administering a Capital Punishment sentence as required by applicable laws and statutes of the Commonwealth of Pennsylvania;

F. Make reasonable accommodations for and respond appropriately to the needs of the representatives of the various news media in their coverage immediately before, during and after an execution, while preserving the good order and security of the institution; and

G. Provide for appropriate accommodations for preparing registered victims who have chosen to serve as a witness of an execution.

H. Ensure the appropriate dissemination of records and information relating to capital case inmates.

VI. PROCEDURES

All pertinent procedures regarding this policy are included in the Capital Case Manual.

The policies developed under the authority of this document are public information. The attached manual is confidential, is <u>not</u> public information and is not subject to any disclosure requirements otherwise governing the contents of the Department's Administrative Manuals.

VII. SUSPENSION DURING EMERGENCY

In an emergency situation or extended disruption of normal institutional operations, any provision or section of this policy may be suspended by the Commissioner or his/her designee.

VIII. RIGHTS UNDER THE POLICY

This policy does not create rights in any person nor should it be interpreted or applied in such a manner as to abridge the rights of any individual. This policy should be interpreted to have sufficient flexibility so as to be consistent with law and to permit the accomplishment of the purposes of the policies of the Department of Corrections.

IX. SUPERSEDED POLICY AND CROSS REFERENCE

A. This policy supersedes the following policies:

Volume I, 1.4.2, News Media Coverage of Executions, issued on 9-28-92, by former Commissioner Joseph D. Lehman

Volume VI, 6.3.9, Solitary Confinement Officer, issued on 9-28-92, by former Commissioner Joseph D. Lehman.

Volume VI, 6.3.9-1, Solitary Confinement Officer, issued on 9-5-95, by Commissioner Martin F. Horn.

Volume VI, 6.5.4, Legal Materials, Access for Capital Cases, issued on 9-28-92, by former Commissioner Joseph D. Lehman.

Volume VI, 6.5.8, Capital Cases, issued on 9-28-92, by former Commissioner Joseph D. Lehman.

Volume VI, 6.5.8-1, Capital Cases, issued on 1-10-96, by former Executive Deputy Commissioner Raymond E. Clymer, Jr.

Volume VI, 6.5.8-2, Capital Cases, issued on 9-5-95, by Commissioner Martin F. Horn.

Volume VI, 6.5.8-3, Capital Cases, issued on 9-13-96, by former Executive Deputy Commissioner Raymond E. Clymer, Jr.

Volume VI, 6.5.9, Programs for Phase I Capital Cases, issued on 9-28-92, by former Commissioner Joseph D. Lehman.

Volume VI, 6.5.10, Capital Cases Management Plan Policy (pilot Project), 9-28-92, by former Commissioner Joseph D. Lehman.

Volume VI, 6.5.12, Phase III Capital Case Administration, issued on 5-1-95, by Commissioner Martin F. Horn.

Volume VI, 6.5.12-1, Phase III Capital Case Administration, issued on 9-5-95, by Commissioner Martin F. Horn.

Volume VI, 6.5.12-2, Phase III Capital Case Administration, issued on 9-13-96, by former Executive Deputy Commissioner Raymond E. Clymer, Jr.

Volume XVI, 16.2.5, Injection Team, issued on 3-28-91, by former Commissioner Joseph D. Lehman.

B. Administrative Manuals Cross Reference(s):
DC-ADM 009, News Media Relations
DC-ADM 801, Inmate Disciplinary and Restricted Housing Procedures
DC-ADM 802, Administrative Custody Procedures
DC-ADM 806, Inmate Deaths
DC-ADM 812, Visiting Privileges
DC-ADM 815, Commissary Privileges
DC-ADM 816, Inmate Compensation System
DC-ADM 818, Inmate Telephone Calls
1.4.1, 1.4.1-1, 1.4.1-2 News Media Relations

C. ADA Cross Reference(s): None

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS

CAPITAL CASE MANUAL 6.5.8

CONFIDENTIAL

Last Revised on: July 24, 1997

Distribution Restricted to:

Commissioner of Corrections
Executive Deputy Commissioner
Regional Deputy Commissioners (3)
Superintendent, Capital Institution
Deputy Superintendents, Capital Institution (2)
Superintendent, Home Institution
Deputy Superintendents, Home Institution (2)
Director, Office of Professional Responsibility
Chief of Security
Chief Counsel
General Counsel
Press Secretary

Approved by:

/s/ Martin F. Horn
Commissioner
Date: 7/24/97

Definitions:

A. **Administrative Custody** – A status of confinement for non-disciplinary reasons which provides closer supervision, control, and protection than is provided for in general population.

B. **Attorney of Record** – The person appointed by the court or designated by the inmate as legal counsel to the inmate at the time of the scheduled execution.

C. **Capital Case** – An inmate (1) physically committed to the Department of Corrections under a sentence of Capital Punishment; (2) pending sentencing under a jury recommendation for Capital Punishment; or (3) whose sentence of Capital Punishment has been vacated, but is awaiting re-sentencing where a sentence of Capital Punishment may be reimposed.

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D. Visiting

1. All visits for inmates in Phase I shall be non-contact unless otherwise directed by court order or approved by the Commissioner of Corrections or designee.

2. Each inmate will be allowed one (1) visit per week.

3. The duration of a visit shall be a minimum of one (1) hour and a maximum of two (2) hours.

4. Legal and Spiritual Advisor visits are not counted, however they are to be non-contact.

5. Special requests for a contact visit by an Attorney for testing, etc., must be forwarded to the Office of Chief Counsel for review. The respective Regional Deputy Commissioner shall approve/disapprove all contact visit requests.

6. Attorney/Client confidentiality privileges are to be maintained and each inmate must be afforded the opportunity to have confidential conversations with the Attorney of record.

7. Additional and/or extended visits may be approved by the Superintendent or designee as per the DC-ADM 812, Visiting Privileges policy.

E. Telephone Calls

1. Each inmate is to be afforded the opportunity to place one (1) collect, fifteen (15) minute telephone call per week.

2. In addition, collect telephone calls to the Attorney of record will be permitted upon request by the Attorney, but restrictions may be imposed if abuse of the privilege occurs.

3. Telephone calls to an Attorney will be handled in accordance with the DC-ADM 818, Inmate Telephone Calls policy.

F. Television and Radio

Personal television and radio may be permitted in accordance with the DC-ADM 802 Administrative Custody Procedures policy.

G. Exercise

1. Phase I Capital Case inmates shall be permitted one (1) hour of outdoor exercise five (5) days per week, weather permitting.

2. Up to two (2) inmates may be permitted to exercise together in an outside exercise area, taking into account separation and security concerns, for one (1) hour per day, five (5) days per week.

3. A handball and/or basketball is permitted.

Cell Property

1. One (1) record center size box is permitted.

2. An arm chair or desk type piece of furniture is also permitted provided it is of a material that does not pose a security threat.

3. Inmates of the Muslim faith are permitted One (1) prayer rug, however, it must be rolled up when not in use.

4. Commissary items, such as lotions, creams, etc., are permitted, but the items may not be retained by the inmate.

Available Programs

Educational and leisure programs shall be made available to interested Phase I Capital Case inmates housed in Administrative Custody.

1. Educational Programs

a. Educational programs shall range from basic literacy through high school.

b. The programs will be at no cost to the inmate.

c. Post-secondary opportunities may be made available at the inmate's expense.

d. Other educational programs available are:

(1) Adult Basic Education (ABE)
(2) General Equivalency Diploma (GED)
(3) Individual/Self Study Program

e. In-Cell Work Programs may be considered. If developed and approved, appropriate pay in accordance with the DC-ADM 816, Inmate Compensation System policy, should be afforded.

2. Education Director

The Education Director will assure that:

a. All Phase I Capital Case inmates are made aware of educational opportunities available, and are advised of the procedures for requesting participation.

b. The standard materials are available and are provided as needed. (S)he will also assure that appropriate tutoring is provided as needed by the particular program.

c. Only materials deemed appropriate for each level are used.

3. Leisure Activities

The Activities Manager will assure:

a. That Phase I Capital Case inmates are aware of recreational opportunities and are advised of procedures for requesting participation.

b. Only selected and approved arts and crafts materials, authorized by the Superintendent are used.

4. Religious Activities

As permitted in accordance with the DC-ADM 802 Administrative Custody Procedures policy.

5. Reading Materials

a. Library materials may be made available through established procedures.

b. Inmates will be allowed to retain legal, religious, educational, recreational reading materials (books and magazines) and other legal documents that can be stored in the one (1) record size box permitted.

c. Newspapers will be permitted on a one (1) for one (1) exchange basis.

J. Inmate Transfers

If a Phase I Capital Case inmate participating in a program is transferred, progress records and the materials being used will be transferred with the inmate to assure continuity of participation at the next institution.

K. Placement in Disciplinary Custody Status

A Phase I Capital Case inmate transferred to Disciplinary Custody Status will be suspended from program participation until returned to Administrative Custody in accordance with the DC-ADM 802 Administrative Custody Procedures policy.

L. Capital Case Inmate Transfer to Mental Health Unit or SCI-Waymart Forensic Unit

The procedures contained in this manual are applicable to all capital case inmates transferred to a mental health unit or to the SCI-Waymart Forensic Unit. Any variation from these policies for the purpose of engaging the inmate in more treatment programs or variance for any other reasons must be requested in writing to the Department's Chief of Psychiatry in the Bureau of Health Care Services. The Chief of Psychiatry in consultation with the appropriate Regional Deputy Commissioner and the Commissioner shall make a decision as to whether to deviate from policy.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS

POLICY STATEMENT
Commonwealth of Pennsylvania
Department of Corrections

Policy Subject: Inmate Mail and Incoming Publications

Policy Number: DC-ADM 803

Date of Issue: January 22, 2001

Authority: Martin F. Horn

Effective Date: February 19, 2001

I. AUTHORITY

The Authority of the Secretary of Corrections to direct the operation of the Department of Corrections is established by Sections 201, 206, 506, and 901-B of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, No. 175, as amended.

II. PURPOSE

It is the purpose of the Department of Corrections to establish policy and procedures that govern inmate mail privileges and incoming publications.[2]

III. APPLICABILITY

This policy applies to all inmates and employees, volunteers, and contract vendors who reside or work in

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[2] 1-ABC-5D-01; 1-ABC-5D-04; 2-CO-5D-01

facilities under the jurisdiction of the Department with the exception of the Bureau of Community Corrections.

IV. DEFINITIONS

A. Approved Inmate Name

The committed name and/or a name change that is in accordance with Department policy, **11.5.1, "Records Office Operations."**

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F. INCOMING PUBLICATIONS

1. General Procedures

a. All publications must be received from the original source. Covers of hardbound publications may be damaged through examination or removed where inspection of the cover is deemed necessary and no reasonably available alternative form of inspection is adequate.

b. Magazines must be mailed directly from the original source. Small letter sized pamphlets may be received in regular correspondence from family members, friends or religious advisors.

c. Newspapers may be mailed or delivered to the facility.

d. Publications that are sent directly from a publisher, bookstore, book club, distributor or department store will usually be deemed to have come from the original source.

e. Newsletters and other mail from recognized non-profit religious and charitable organizations,

when addressed to an individual inmate shall be delivered to the inmate even if mailed at less than first or second-class mail rates (i.e., bulk mail rate).

f. If a publication contains questionable content, mailroom personnel, education staff, or the librarian will be responsible for forwarding these publications to the Incoming Publication Review Committee (IPRC).

g. An inmate may receive more than one copy of any publication only with special approval of the IPRC.

h. Upon transfer, publications approved at one facility will not necessarily be permitted in another facility. The IPRC at the receiving facility will review any publications that are deemed questionable.

i. Upon receipt of mail sent at less than First or Second Class Rate, the mail inspector will verify that the stamp specifically states "Bulk Rate" and if the words "Bulk Rate" are not printed on the mail, it will be processed as incoming mail.

j. However, if the words "Bulk Rate" are marked on the item, the mail inspector will determine if the item meets the criteria for a publication as outlined in section, IV-P. If the criteria for a publication are met, it will be accepted and processed in accordance with section, IV-F regardless of the postal rate at which it was mailed. Although, if the item has a Bulk Rate Stamp, but does not meet the criteria for a publication, delivery will be refused in accordance with section, VI (E)(9).

DEPOSITION OF: JOEL DICKSON

* * * * *

[page 4]

JOEL DICKSON, a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. KRAKOFF:

Q. What is your name?

A. Joel Scott Dickson.

Q. Are you a deputy superintendent at the State Correctional Institution at Pittsburgh?

A. I am.

Q. What is your title?

A. I'm the deputy superintendent for centralized services.

Q. What does that job entail?

A. Generally, I have oversight of the treatment side of the institution: the hospital care, dietary, treatment services to include drug and alcohol, the psychology department. Correctional industries falls under my purview. That pretty much covers the big ones.

Q. You supervise those areas?

A. I do.

Q. Did you hold any other positions at

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SCI Pittsburgh prior to that?

A. Yes, I did. I previously was the deputy superintendent for internal security.

Q. When did you hold that position?

A. From my hiring here in July of 1998 through March of this year.

Q. March of 2002?

A. Correct.

Q. Was it in March that you assumed the other centralized services position?

A. Yes.

Q. Will you summarize what your responsibilities were when you were deputy superintendent for internal security?

A. Primarily, I supervised all the functions of the security office, which would include all internal investigations in the institution.

Also, I was responsible for control and access control to the institution and out of the institution trying to ensure that contraband did not enter the institution through the visiting room, the mailroom, things like that.

I also had oversight of the RHU, the Restricted Housing Unit, which includes the

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LTSU, the Long Term Segregation Unit.

Q. What were your responsibilities in conjunction with the Long Term Segregation Unit?

A. I had, again, direct supervision. I worked directly for the superintendent. I played a significant role in the development of the Long Term Segregation Unit here at Pittsburgh and directly supervised the staff in the LTSU.

Q. Did you play any role in the development of policies as they related to the access of Long Term Segregation Unit inmates to newspapers or other reading materials?

A. Primarily, we would enforce those policies and procedures that were formulated at our central office.

Q. And that is the same, I suppose, with respect to access of inmates in the Long Term Segregation Unit to photographs?

A. Yes.

Q. Do you know who within the central office developed the Long Term Segregation Unit policies?

A. Policies and procedures come out of the office of standards and practices. Who

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specifically played a role, generally these are done through a committee process. Who participated in that, I couldn't say.

Q. Are there permanent members who would sit on the committee process, or would that vary?

A. I honestly don't know.

Q. But you're, I suppose, intimately familiar with the policies that apply in the Long Term Segregation Unit to access to reading materials as well as access to photographs?

A. I can generally speak to those issues. Yes.

Q. In your current capacity of centralized services, I take it that you don't have any responsibilities in conjunction with maintaining security in the LTSU; is that right --

A. That's correct.

Q. But the other --

A. That's correct.

Q. I'll complete my sentence, because I didn't. The other superintendent has responsibility over that area?

A. To clarify, the position of the

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deputy for internal security has been abolished, and the LTSU now falls -- the chain of command would fall directly under the major for unit management and then the deputy superintendent for facilities management.

Q. Who is that person?

A. The major is Major Frank Cole, and the deputy superintendent for facilities management is Deputy Mark Krysevig.

Q. Maybe you can spell that.

A. K-r-y-s-e-v-i-g.

Q. This is somewhat redundant. Let me represent to you that before scheduling this deposition, I asked the Department of Corrections through Mr. Mericli, meaning that I conveyed the message through Mr. Mericli, for the Department to designate an official of the Department who would be able to testify authoritatively and comprehensively on behalf of the Department with respect to its policy governing the possession of newspapers, magazines, and other published reading materials in the Long Term Segregation Unit and also possession of photographs by inmates in that unit.

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My understanding is that you were designated to speak on behalf of the Department. Is my understanding correct?

A. That's my understanding as well. Yes.

MR. MERICLI: That's my understanding as well.

BY MR. KRAKOFF:

Q. More specifically, you feel comfortable that you can speak authoritatively and comprehensively with respect to what purpose or purposes -- penological, institutional - are said to be related to the policies governing access by LTSU inmates to reading materials and photographs?

A . Yes, I can.

Q. How many prisons in the Pennsylvania prison system have Long Term Segregation Units?

A. One.

Q. That one LTSU is located in Pittsburgh; is that right?

A. That's correct.

Q. In what year did the unit, the LTSU, actually begin operation at SCI Pittsburgh?

A. The first inmate came to the LTSU in

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April of 2000.

Q. Then from there, I suppose, other inmates came, and eventually it was populated by a fair number of inmates?

A. Yes.

Q. Had there been an LTSU in operation anywhere else before that first inmate came to Pittsburgh's LTSU?

A. In the Pennsylvania Department of Corrections?

Q. In the Pennsylvania --

A. No.

Q. Where within the SCI Pittsburgh complex is the Long Term Segregation Unit located?

A. The area is labeled as A 300, which is Building or Block A, third floor.

Q. I gathered from your earlier testimony that the Long Term Segregation Unit is considered a form of Restricted Housing Unit confinement; is that right?

A. Yes.

Q. Are there any other categories of housing units that are located on the third floor of that building?

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A. No.

Q. How many pods does the Long Term Segregation Unit occupy?

A. There are six pods.

Q. How are they numbered or lettered or otherwise identified?

A. Well, there are eight -- there are two sides, the A side and the B side, which have three pods each; and there are eight cells in each of the pods.

Q. Are the pods numbered or lettered? This isn't a test I'm giving. I'm just trying to get a fix on that.

A. We recently had a renumbering system. The cells are numbered by side, labeled A, B, and then --

Q. There's a B side?

A. There's an A side and a B side.

Q. So there would be three pods on A side and three pods on B side?

A. That's correct.

Q. It's my understanding that the Long Term Segregation Unit contains two levels, two classification levels of LTSU inmates. One is referred to as Level 1. The other is referred

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to as Level 2; is that correct?

A. That's correct.

Q. Level 2 is the level that inmates who are newly introduced into LTSU confinement are given?

A. That's correct.

Q. And Level 2 can also result when an inmate who has been promoted to Level 1 has done something to warrant a reversion back to Level 2 status?

A. That's correct.

Q. The A side and the B side, do each of those sides contain either Level 1 or Level 2, or are the two levels commingled?

A. They are presently commingled, although we try to segregate as much as possible certain inmates from others. Right now, there is a low number of Level 1 inmates. So cell space requires us to commingle the two.

Q. So under ideal circumstances, assuming that you have enough cells to house all of the Level 1 inmates that you have and all of the Level 2 inmates you have --

A. We would segregate.

Q. -- you would segregate?

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A. Yes.

Q. Are there times when you have been able to do that?

A. At least in the fashion of one pod, yeah.

Q. I'm not going to go into detail with you about the various other policies and practices that exist in the unit, such as how long they're allowed out of their cell for recreation and visits and that sort of thing, because we have an answer to our complaint. There are certain acknowledgments of those facts.

But if I reduce it to its essence, this is a very high security segregation area in which the inmates are essentially in their cells for all but an hour or so a day; is that right?

A. That's correct.

Q. And are these cells single-occupant cells, or are there two inmates to a cell?

A. They're all single-occupant cells.

Q. Is that a matter of policy?

A. Yes.

Q. So an inmate in one cell is separated from an inmate in another cell by a

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wall and by the doors that front the respective cells; is that right?

A. Yes.

Q. So an inmate can't just open up his cell door and walk next door, for example, and then go into another inmate's cell?

A. No.

Q. That's prohibited, in fact?

A. Yes.

Q. In fact, it wouldn't even be possible unless an officer opened --

A. Only by mistake would that happen.

Q. These cell doors are controlled by an officer in some sort of a bubble or a booth or electronically opened --

A. Yes.

Q. -- is that right?

A. Yes.

Q. How many inmates are typically held in Pittsburgh's LTSU on a given day? I'm only asking you for a rough number. I know it's going to vary probably from day to day to some extent, or I assume that's the case.

A. Actually, it's fairly stable. The central office has agreed to keep our maximum

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population in the LTSU at 40, and generally we have in the high 30s is our population.

There are 48 cells on the unit, but this gives us some flexibility to meet some of those segregation requirements and rotation of cells when we have a cell off line or something.

Q. Is there any sort of a library facility in the LTSU, either a law library or some sort of a general recreational library?

A. There is a mini law library in the LTSU.

Q. There is no recreational law library in the LTSU; is that right? By recreational, I'll define that. What I mean is kind of a general circulation type library where you have books of fiction --

A. No.

Q. -- biographies and that sort of thing?

A. No.

Q. Does the institution maintain a general circulation or general recreation library anywhere in the complex?

A. Yes.

Q. Where is that located?

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A. It's collocated with the school.

Q. It's in the school building?

A. Right.

Q. That library, does that also contain a law library?

A. Yes, it does.

Q. Is there somebody who supervises that library, like a librarian?

A. Yes.

Q. Does the librarian supervise both the law library and the general recreational library?

A. Yes.

Q. Do you know the name of the person who functions as the chief librarian?

A. I do.

Q. Who is that?

A. James West. I don't know how to pronounce it. We call him West. I have the spelling. Let me see if I have it on a piece of paper here. I'll have to look it up, because it's got a lot of different consonants in it.

Q. Is West kind of a shorthand way of --

A. West, yeah. James West is what he

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goes by.

Q. He's a civilian employee?

A. That's correct.

Q. Do Long Term Segregation Unit inmates have physical access to the prison's library, meaning can they either on their own or by escort actually go into the library to use it?

A. No.

Q. That's a matter of both policy and practice?

A. That's correct.

Q. How many of the inmates which generally is in the high 30s in the LTSU are Level 2, on Level 2 status?

A. Well, as we sit here today, we have a population of 39 total inmates on the LTSU, three of which are Level 1.

Q. What was the total?

A. Thirty-nine.

Q. Three or Level 1?

A. Correct.

Q. Is that breakdown typically the case, somewhere in the 30s are Level 1 and a lower number level -- I'm sorry. Did you say

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three were in Level 1?

A. Correct.

Q. So that would mean 36 are on Level 2 as you speak?

A. That's correct.

Q. Is that a typical ratio, with a substantial majority being Level 2 and the minority being Level 1?

A. I would say in general, yes. These may be a little bit skewed today, because we recently had a number of Level 1s that were moved, but generally in

the single digits for a Level 1 and the remainder being Level 2.

Q. As a matter of DOC policy, is there a minimum amount of time that an inmate must remain on Level 2 status before being eligible for placement on Level 1 status?

A. Yes.

Q. How long is that time?

A. Ninety days.

Q. As a matter of DOC policy, is there a maximum amount of time -- an outer limit, in other words -- that an LTSU inmate can remain on 24 Level 2 status?

A. No.

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Q. . So under DOC policy, a given inmate can remain on Level 2 status in the LTSU for a matter of many months or even several years; is that true?

A. Yes.

Q. Can you tell me what the typical length of confinement on Level 2 status is? Just roughly, from X number to X number of months or whatever. I know we're fairly early into it, because it only opened in -- was it 11 2000?

A. Right. April of 2000.

Q. So we --

A. Two-and-a-half years into this. I wouldn't even hazard a stab at it. Many of the inmates that we have

that are on Level 2 now came here to us in April of 2000 and have remained on Level 2. And some inmates that have subsequently arrived here have passed through Level 2, Level 1, and moved on to other institutions. So...

Q. Whether they moved from Level 2 to Level 1 is a determination that is -- obviously 24 is a determination that is made by prison officials; true?

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A. True.

Q. That's based upon the conclusions by the officials as to whether or not a particular inmate on Level 2 has progressed to the point where in the judgment of prison officials it would be warranted or appropriate to promote that inmate to Level 1; is that right?

A. That's correct.

Q. Is there either a document that reflects on kind of an ongoing basis, whether each month or every few weeks, how long a particular inmate has been on Level 2 status, or are there documents from which, even if it's not explicit -- in other words, even if it doesn't say eight months -- are there documents from which, if I had the documents, I could look at them and calculate how long the various inmates, the respective inmates, have been on Level 2 status?

A. Yes.

Q. Which is it? Is there a document that keeps kind of a running tally of how long an inmate has been on Level 2 status?

A. Yes.

Q. Is that found on some sort of a

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compilation that would contain the names of all of the LTSU inmates, or is that something that could only be gleaned by looking at the individual institutional records of the particular inmate?

A. I don't know that we have a management tool that lists all the inmates and has all of their disciplinary custody times reflected on it.

Q. Disciplinary or you mean level times?

A. Both. Generally, those types of documents will be individual documents for that particular inmate.

Q. There is a document that contains, I assume, that contains a roster of the names of, for example, the 39 inmates who are there today? Each of their names will be on some sort of a list?

A. Yes. For instance, this is a roster, the recent roster. This one is dated June 3rd, '02.

Q. What information does that roster contain, other than the names and the institutional numbers of each of the inmates?

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Does it contain any other information?

A. This particular document contains the arrival date of the inmate, his inmate number, his name, the level that he's currently on, the counselor's initials, and when he's due for an annual review.

Q. I couldn't look at that -- in other words, the fact that it says inmate John Smith and this is his tenth month, and it would show that he's on Level 2 or Level 1; right?

A. It would show his level, but it wouldn't show how long he's been on that level.

Q. What I was going to say is: You'd get a skewed idea if you simply looked at that document, because it's possible that John Smith came in on Level 2, was on Level 1 --

A. That's correct.

Q. -- for six months, and now he's back on Level 2?

A. That's correct.

Q. Do you think that there is some way that a computer could generate -- one of the computers that you have in the institution that could generate the names of the respective inmates, how long they have been in the LTSU,

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and the total amount of time they have been on Level 2 status?

A. Yes.

Q. I'd like to obtain that document just so that we can get a more specific idea of how long they remain -- I know the superintendent indicated that some of the inmates who came in on Level 2 have -- I think you said basically they have never left Level 2?

A. That's correct.

Q. Then others have left; and, in fact, others have left the entire unit itself.

MR. MERICLI: Well, the only difficulty with that is if discovery closes.

MR. KRAKOFF: I know. I would just end up at some point subpoenaing that information. So it might help us.

MR. MERICLI: All right.

MR. KRAKOFF: I would appreciate it.

MR. MERICLI: Sure.

MR. KRAKOFF: And I won't insist that you answer all my interrogatories on time, which is today.

MR. MERICLI: I know. I left a

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message for that.

MR. KRAKOFF: And that wasn't sarcasm.

MR. MERICLI: All right.

MR. KRAKOFF: That was an attempt to be nice.

BY MR. KRAKOFF:

Q. What are the basic purposes and objectives of the Department's Long Term Segregation Unit? You don't have to -- I have summaries and some of the policies. But in a nutshell, what's the purpose and what are the objectives of the --

A. I suppose one of the primary purposes is to further ensure the safety and security of the Department. And secondarily, but certainly important, is to try to affect some behavioral change of the inmates that are assigned to the LTSU.

Q. Do the basic purposes of the Long Term Segregation Unit differ from the purposes of the Department's Special Management Unit?

A. I think obviously the overall purpose of the Department is to change behaviors, change unacceptable behaviors.

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Inmates that come to the LTSU in many cases have proven that the efforts in the Special Management Units have failed in that regards.

In other words, the SMU is obviously a phase program, and it's structured in such a way as to change or modify behaviors to a more acceptable level. And as I say, many of the people that are in the LTSU now have failed to respond to the SMU environment.

Q. If I understand you then, the SMU stresses behavioral changes more, say, than the LTSU; is that right?

A. No. I wouldn't say that. What I'm saying is that the SMU is a -- I wouldn't say interim, but it's a level of effort to modify an inmate's behavior, and the LTSU is a more strict environment because of particular behaviors that this inmate may have demonstrated in the SMU.

Currently, the State's population roughly is about 38,000-plus inmates in our system, and what we have here in the LTSU represents one tenth of one percent of that overall population. And they are the most incorrigible, the most difficult, problematic,

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and have demonstrated the most behavior conflicts, if you will.

So we're all in the same effort to modify behavior, but these inmates have in many cases, most cases, have failed to respond to an SMU environment.

Q. So most of the inmates in the LTSU are people who have flunked out of or failed in the SMU?

A. That's an accurate statement. Yes.

Q. In a minority of cases, a person, I suppose, an inmate can come directly from some other prison where he wasn't in an SMU --

A. That's true.

Q. -- to the LTSU; is that right?

A. Yes. That's true.

Q. Does SCI Pittsburgh have a Special Management Unit?

A. No.

Q. Where are the Special Management Units located within the system?

A. SCI Greene and SCI Camp Hill.

Q. Would the total population of the Special Management Units, to your knowledge, exceed that of the 30-something-odd inmates who

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are usually in the LTSU?

A. Yes.

Q. Do you have a sense of how many inmates have -- I'm using the term graduated. I don't know. You might have your own term that you use here; that is, promoted or been released from or something like that. But you understand what I mean by graduated?

A. Yes.

Q. Do you have a sense of approximately how many inmates have actually graduated from the Long Term Segregation Unit since its inception?

A. It's my understanding that so far twelve have left the LTSU. Two inmates have maxed out, and the other ten have moved on to other institutions.

Q. Under DOC policy, is Long Term Segregation Unit confinement considered a form of Disciplinary Custody?

A. Yes.

Q. Is it a form of Disciplinary Custody in the sense that inmates are sent there because they have been adjudicated by a hearing officer to have violated the DOC's rules, or do you mean

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disciplinary in some other fashion?

A. In most cases inmates come to the LTSU with Disciplinary Custody time. There have been some cases where inmates have come on Administrative Custody status.

Q. So the status --

A. But the reasons -- the main reasons for an inmate to come to the LTSU are the SMU failures, the behaviors, unacceptable behaviors in other institutions. So from that perspective, if we use the word discipline or disciplinary in a general sense, yes.

Q. But they're not necessarily serving disciplinary time; isn't that right?

A. They may not be.

Q. And, in fact, when an inmate comes into the LTSU with disciplinary time, that time eventually will expire?

A. True.

Q. Is there a document that reflects which of the inmates who are in the LTSU now actually are on Disciplinary Custody status as opposed to just Administrative Custody status?

A. Again, I'm not sure if we have one specific document that shows that.

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Q. But --

A. It would be easily retrievable from the mainframe or wherever, you know, as far as specific inmates.

Q. With respect to -- and I'm going to get into the specifics in a little while, but with respect to access to newspapers and access to magazines and access to books and access to photographs of family members and friends, does the policy or practice in the LTSU

draw any distinction between those inmates who are on Level 2 status serving disciplinary time and inmates who are on Level 2 status solely on an Administrative Custody --

A. No.

Q. -- basis? They're both treated the same?

A. Correct.

Q. As a broad proposition, would it be accurate to say that under DOC policy, the Long Term Segregation Unit is considered a form of Administrative Custody?

A. I'm not sure I understand the question.

Q. There is a -- is it ADM 802 that

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talks about --

A. Governs --

Q. -- Administrative Custody?

A. Right.

Q. Does that document, to your knowledge, place the LTSU under the rubric of Disciplinary Custody, Administrative Custody, or some other form of custody, if you know?

A. Well, the 802 doesn't address LTSU specifically.

Q. Is there any other document that you can recall which specifies whether this is a form of Administrative Custody or a form of Disciplinary Custody or some other --

A. Well, 6.5.1 DOC policy, our procedure manual, 6.5.1 references both under the LTSU and under the RHU specifically, addresses the 801 and the 802 which govern either Disciplinary Custody or Administrative Custody.

Q. Now I want to focus our attention on DOC policies with respect to publications and then later photographs, access to photographs.

Under DOC policy, are general population inmates permitted to obtain

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newspapers from the outside, meaning from society, in any way?

A. Yes.

Q. How may they obtain newspapers?

A. They may individually subscribe to them through the mail, or they may access them through the -- they can buy them in the commissary, and they can also read them in the library.

Q. Isn't it accurate to say that no newspapers or articles from newspapers are permitted to come into this institution by regular mail unless the newspaper is sent directly from a publisher? Is that accurate to say? In other words, a relative or a friend isn't permitted to just send a newspaper into an inmate, or am I wrong on that?

A. An inmate can't receive a newspaper directly from a relative. You're right. It has to come from the publisher.

However, you mentioned newspaper articles. That wouldn't be the case. For instance, if there were some

article, an obituary, for instance, or an article about somebody's neighbor or whatever that was being

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mailed in by a private citizen, that wouldn't be considered contraband.

Q. What if it just related to an issue that was not personal to the inmate, if it just was an editorial about the state of our economy r some article about the Middle East or something like that? Can they come in through regular mail from third parties?

A. To what population?

Q. I'm talking now exclusively about general population.

A. Yes, they could.

Q. You mentioned newspapers that come in. Again, I'm focusing on general population prisoners, and by that I mean inmates who are not in some form of segregation.

A. Right.

Q. They're permitted to subscribe. The publisher can then send a newspaper in through the regular mail, and the inmate is allowed to -- a copy -- not a copy. The newspaper is then delivered to the inmate, his cell?

A. Yes.

Q. Is the inmate in general population allowed to retain the newspaper in his cell?

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A. Yes.

Q. Is there any limit for general population inmates as to the number of newspapers they're permitted to receive from publishers through subscriptions? Is there any number? You're allowed to order three newspapers or five newspapers?

A. Not that I know of, no. The only limitation would be the cell property limitations.

Q. Meaning because of security factors or fire code issues, inmates have some limitation on the number of personal property items they're allowed to have?

A. Right.

Q. What is that? Is that done according to the number of boxes they're allowed to have in their cell?

A. Overall, there's a property limitation, yes. If an inmate chooses to have -- well, there's a limitation, for instance, on magazines. They can only have ten magazines at any given time. Newspapers, I'm not sure what the number is.

Q. But it's several? They could have

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several newspapers?

A. Yes. Yes.

Q. If somebody sends in an article from a newspaper, either a relative or a friend or somebody, they're allowed to read that in their cell and retain the article?

A. Yes.

Q. If they purchase -- meaning, general population inmates go to the commissary and purchase a newspaper from the commissary, are they permitted to take a newspaper back to their cell?

A. Yes.

Q. And the rest would be the same. They could keep those newspapers in their cell subject to general security and fire hazard issues?

A. Yes.

Q. Do you know offhand or could we find out if you don't know -- and I imagine you might not know specifically -- do you know what newspapers are sold in the commissary?

A. Let me see. The Post-Gazette weekly and Sunday papers are delivered by the commissary. Inmates can order most any paper.

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It's mailed into the mailroom and delivered to the blocks. And then these --

Q. That's subscription?

A. Right. And then the librarian gave me copies of the newspapers that are available or subscribed to at the library.

MR. KRAKOFF: Mr. Mericli, may I --

MR. MERICLI: Sure.

MR. KRAKOFF: Maybe what I'll do is just mark this as an exhibit, and then that will be marked as Plaintiff's Exhibit 19.

(Whereupon, the document was marked as Plaintiff's Exhibit No. 19 for identification.)

BY MR. KRAKOFF:

Q. The newspapers from the commissary, are they delivered to the blocks, or do the inmates go to the commissary and –

A. They would get them at the commissary.

Q. The newspapers that are in the prison's general library, are they circulated? Meaning, can an inmate from general population take a newspaper with him out of the library?

A. I don't believe so. No.

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Q. But if an inmate comes to the library and wants to read one of the newspapers that are subscribed to by the librarian, assuming one is available at a particular time, they're allowed to read them in the library?

A. Yes.

Q. To your knowledge, is there any limitation on -- and you might have spoken to this already. If you have, I apologize for asking it again. But are inmates in general population allowed to subscribe to any newspaper of general circulation in the United States?

I'm not referring to the Communist Daily or MIM Notes or whatever, but assuming that it meets censorship guidelines or screening guidelines, can an inmate order a newspaper -- can an inmate from

general prison population order a newspaper from essentially anywhere in the United States?

A. Yes.

Q. If an inmate wants to order, say, from Puerto Rico or some other country, can they do that as well?

A. Yes.

Q. Let's focus on newspapers with

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respect to other classifications. What other classifications of prisoners under DOC policy are permitted to receive newspapers through subscription via the mail and to retain the newspapers in their cells?

I'll just throw out some of the classifications that I'm thinking about. If I'm missing some, you can add to that. But I'm thinking in terms of the traditional Disciplinary Custody classification in the RHU, the capital case management or death row. I don't know whether Pittsburgh still has one.

A. Not anymore.

Q. And the traditional Administrative Custody maximum and Close or whatever they're called. I'm contrasting that to LTSU, just your garden variety Administrative Custody.

A. Do you have as one of your exhibits a copy of –

Q. I think I do.

A. -- 6.5.1.

Q. Why don't we just identify the document, and we can all save time. Assuming that that's current, are

you referring to the -- there's a procedures manual. Then there's an

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LTSU handbook.

A. Show me the procedures manual. There you go.

Q. Okay.

A. There's been basically two corrections to this document, not that apply to your specific question, but this is reversed here. This should be -- Level 1 should read as Level 2 and vice versa, and this should say -

Q. The same information --

A. This has just been reversed. It's been transposed, and this should read "any approved visitor". But with regard to incoming publications, that document is currently what we follow.

Q. So that we can identify for purposes of this deposition what that document is, it's Attachment A to Plaintiff's Deposition Exhibit Number 8, and it's a chart.

(Whereupon, the document was marked as Plaintiff's Exhibit No. 8 for identification.)

BY MR. KRAKOFF:

Q. The reason I asked that was because I didn't have -- in the copy that I received of

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Attachment A, the top headings didn't come out. So why don't we label -- there are three categories?

A. Correct.

Q. The one on the left, should the heading of that be RHU?

A. Correct.

Q. And the one in the center of Attachment A, what should the heading of that be?

A. SMU.

Q. And the third category, the one on the far right?

A. Is LTSU.

Q. I can dispense with those. I have my answers to that question.

I'm going to refer you back to Attachment A so that I can clarify. Under the RHU category, it says inmate mail and incoming publications. Do you see that in the far left column?

A. I see mail incoming publication.

Q. In the far left column--- I might have said category -- the RHU column, the one on the far left?

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A. The RHU, okay.

Q. Where it says mail in the category of mail incoming publications?

A. Yes.

Q. This means that an inmate in the RHU can receive legal personal correspondence as per Administrative Directive 803?

A. That's correct.

Q. And then it says inmate mail and incoming publications. What does that mean?

A. Mail and incoming publication?

Q. Right.

A. Well, that would be what we're speaking of --

Q. That would be the category?

A. That's the activity or whatever or the category running down the first left column.

Q. So ADM 803 would describe --

A. That governs mail.

Q. And incoming publications?

A. Right.

Q. So if I want to see what inmates in the RHU are entitled to receive in terms of incoming publications --

A. Basically, what it says is that an

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inmate, regardless of -- in this case, it says both statuses -- that means either Disciplinary Custody, or Administrative Custody -- can receive one newspaper, ten photographs, and any legal and/or personal correspondence that would be permitted by the 803. So, for instance, things that were -- the Publications Review Committee would allow, those kinds of things.

Q. So what this would mean is, when we say RHU, because you said earlier that the LTSU is in the RHU complex?

A. Right.

Q. This column says that RHU is referring to --

A. The regular RHU.

Q. -- the regular RHU?

A. Correct.

Q. Which would consist of Disciplinary Custody inmates in the regular RHU and Administrative Custody inmates in the regular RHU?

A. Yes.

Q. So an inmate who is in Disciplinary Custody status in regular RHU as opposed to the Long Term Segregation Unit would be governed,

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depending upon what phase he was in, I guess once you reach Phase 2 either --

A. No. Wait a minute. Phases are not a term that we use in the LTSU. Are you speaking of --

Q. No.

A. I'm sorry.

Q. We're in the RHU regular. I don't even know --

A. Okay. There are no phases.

Q. There aren't. Okay. So that I have this pinned down, you're in the regular RHU on Disciplinary Custody status. How many newspapers -- and we can refer to 803. I want to make sure that I'm not confusing anything. Are inmates in Disciplinary Custody status in the regular RHU, are they allowed to receive newspapers in their cells?

A. One newspaper.

Q. One newspaper?

A. Correct.

Q. And are they allowed to exchange that newspaper?

A. One for one.

Q. And where do they receive the

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newspaper from: subscription? Or do they --

A. It would be a subscription.

Q. Subscription only?

A. Right.

Q. Then is an inmate in Disciplinary Custody status in the regular RHU entitled to have any photographs in his cell while he's in the regular RHU?

A. Yes.

Q. How many is he entitled to?

A. Ten.

Q. These can be of family members, friends, or anybody else?

A. They could be of anything as long as it passes the Publication Review Committee's standard.

Q. So you're dealing there with -- they couldn't have nude photographs, for example?

A. Correct.

Q. Then the third column deals with Level 1 and Level 2 in the Long Term Segregation Unit; correct?

A. Correct.

Q. An inmate on Level 1 status in the Long Term Segregation Unit is permitted to have

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one newspaper in his cell; is that true?

A. That's true.

Q. And five magazines; true?

A. That's correct.

Q. And how does he get those newspapers? Do they come from subscription only?

A. Yes.

Q. So he couldn't, for example, purchase a particular newspaper from the commissary, a particular --

A. I don't recall whether or not the newspaper is an item that's permitted to be purchased in the commissary, but I believe it's strictly by subscription.

Q. Can you note, before we leave here, can we track that down?

A. Uh-huh. If you would like, let me step out here for a minute.

Q. I'd appreciate that. Okay.

(Whereupon, a brief recess was taken.)

A. To answer your question, newspapers are on the commissary list for a Level 1 inmate. So they can obtain a newspaper either

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by purchasing it at the commissary or subscribing to it.

Q. Did I ask you what newspapers are available in the commissary?

A. According to this note I got from my secretary, Post-Gazette weekly and Sunday papers are delivered to the commissary.

Q. In no instance, whether an inmate is in the general population, in the RHU regular, the Administrative Custody regular, or the Long Term Segregation Unit are people allowed to simply drop off a newspaper for an inmate; is that right?

A. Correct. I would say -- let me say that Inmate X in general population could give Inmate Y a newspaper.

Q. I understand that.

A. Okay.

Q. You have seen old movies where somebody will come with a pie and deliver a pie for an inmate?

A. Right.

Q. Then it will be brought to his cell?

A. No.

Q. That doesn't happen here with

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newspapers; does it?

A. No, it doesn't.

Q. Is a Level 1 inmate in the Long Term Segregation Unit allowed to receive articles from newspapers through the mail while he's on that level?

A. Yes.

Q. So he could receive particular articles?

A. Yes.

Q. Let's focus on Level 2. What is the policy with respect to the receipt of newspapers by Level 2 Long Term Segregation Unit prisoners?

A. They're prohibited.

Q. What about a situation where somebody sends in a particular article from a newspaper that's been clipped and placed in regular mail? Is an inmate allowed to receive that?

A. It depends.

Q. What would that depend upon?

A. Generally -- well, you used the example -- we used the example before that if it had some connection to the inmate, we wouldn't stop that from going in.

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Q. But if it didn't have a connection, as a general proposition, that's not going to be allowed in; is that correct?

A. That's correct.

Q. Since I believe your testimony was that the newspapers don't circulate from the main recreational prison library, an inmate on Level 2 status is not going to be able to obtain one of the newspapers that is subscribed to by the general library; is that true?

A. That is correct.

Q. And there are no newspapers on the unit, in the Long Term Segregation Unit, which may be provided to inmates from officers under the existing policy; is that correct?

A. Correct.

Q. Again, if this is the second time, a Level 2 Long Term Segregation Unit inmate does not have access, physical access, to the main prison library, meaning he can't be escorted to and does not go on his own to that library; is that right?

A. That's correct.

Q. Is there a policy that prohibits Level 1 inmates who have the one newspaper that

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you were talking about from providing that newspaper to a Level 2 prisoner?

A. Yes.

Q. That's strictly prohibited; isn't it?

A. Absolutely.

Q. If corrections officers find a newspaper in the cell or in the possession of a Level 2 inmate, that would be considered contraband; true?

A. True.

Q. And that will be confiscated from the inmate; will it not?

A. Yes.

Q. As a matter of fact, that would be considered some sort of violation of prison disciplinary rules that could subject the inmate who has that contraband, could subject him at least potentially to some sort of disciplinary action?

A. Yes.

Q. And that would certainly, I would assume -- and correct me if I'm wrong – that would be something that could in fact retard any or delay any promotion from Level 2 to Level 1?

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I'm not saying in itself necessarily, but that would be a negative blot on his record?

A. Sure.

Q. The mini library that you referred to earlier in the Long term Segregation Unit, is that in a special room of some sort?

A. Yes.

Q. Inmates, are they given direct physical access to the mini law library, or do they simply order things from the mini law library to be brought to their cell?

A. They physically go to the mini law library.

Q. If there is a policy, how many inmates are allowed at any one time in the library? Is it one?

A. One.

Q. Is there some sort of a time limit on how long a particular inmate can spend? Is there a general time frame on a particular visit?

A. Generally, there are -- I believe it's a two-hour period of time that they're in the mini law library at one time for one session.

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Q. Is there a limit -- can they go to the library more than once a week?

A. Depends on the demand. And it's a matter of, you know, first come, first serve kind of a thing. And they maintain a roster of people requesting time in the law library.

Q. Obviously, there are no newspapers in the mini law library; is that right?

A. Correct.

Q. Are the only books in the mini law library are legal materials?

A. Right.

Q. Have there been occasions where inmates have been admitted to the Long Term Segregation Unit and therefore initially placed for at least the first 90 days on Level 2 status, have there been occasions where those inmates came into the Long Term Segregation Unit with subscriptions to newspapers?

A. I'm sure there are.

Q. Is there a policy that says what's to happen to the newspapers that are coming in through that subscription?

A. They're held for them in their property, but they're encouraged to cancel their

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subscriptions since they're not allowed to have them.

Q. That property will be kept – they don't have access to those newspapers in their property?

A. (Witness shaking head.)

Q. Is it a box of some sort?

A. Right.

Q. They don't have access to that?

A. They do not.

Q. Any newspapers that an inmate has accumulated prior to coming into the Long Term Segregation Unit, those newspapers are taken and either stored, or, I suppose, with the consent of the inmate, either sent out of the institution or destroyed; is that right?

A. That's correct. When it reaches that volume that's permitted, yes.

Q. General population inmates are permitted to have magazines in their cells?

A. Yes.

Q. As with newspapers, they can order a magazine directly from a publisher by subscription; is that true?

A. Correct.

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Q. And are they permitted to receive articles from third parties from outside the prison in envelopes? Somebody clips an article, sends it to an inmate who is in general prison population from a magazine. Is the inmate ordinarily allowed to receive the article?

A. Yes.

Q. At least with respect to general population inmates, those articles don't necessarily have to relate to the inmate or his community; is that right?

A. That's correct.

Q. So if it's an article about some political event, some cultural event, or whatever, that can come in whether it deals with the inmate or his family or his community?

A. True.

Q. Are magazines in the -- I'll call it the main prison library or the general circulation library. Does that receive magazines for inmate use on the premises via subscription, to your knowledge?

A. Yes. In fact, I'm not sure, but I think I saw some magazines on this list I gave you.

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MR. MERICLI: All I noticed was Newsweek, which had been canceled.

THE WITNESS: There may be another set.

MR. MERICLI: And a reference to the New York Times magazine, which had also been, I believe, canceled.

THE WITNESS: Then I'd have to - I need to check just to verify with the librarian.

BY MR. KRAKOFF:

Q. Will you do that now so that we don't forget, if you don't mind.

A. Sure.

Q. Thanks. I'm going to ask about whether those are allowed to circulate out. You might know that already. It may be the same as newspapers.

A. No. They're not going to be allowed outside the library.

(Whereupon, a brief recess was taken.)

A. The librarian went to lunch. He's going to call me when he comes back, and we'll get an answer.

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Q. Are magazines, individual magazines, sold in the prison commissary?

A. I don't believe so.

Q. Maybe that's something else we can confirm. Are you pretty sure they don't sell --

A. I can check on that, but I am pretty sure we don't sell magazines through the commissary. They have to subscribe to them.

Q. So there's a difference. One is an inmate walks into the commissary, which I assume that there are some goods in the commissary that they sell?

A. Right.

Q. So he walks into the commissary store or exchange or whatever. One scenario is there are magazines there. He can purchase it, gives the person in charge of the commissary some tickets for the purchase price, and then walks out.

The other is that he can get a subscription form from the commissary. The third is he has to write away to the magazine publisher and get a subscription. Is it the third thing that you think --

A. Right.

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. We'll confirm that though. Can I refer you back to Deposition Exhibit 8, that Attachment A? Can you interpret this for me? With respect to regular RHU Disciplinary Custody, are they entitled to have any magazines in their cells through subscriptions?

A. No.

Q. What about Administrative Custody?

A. No.

Q. Level 1, Long Term Segregation Unit inmates, magazines?

A. Correct.

Q. What is this -- it says one newspaper, five magazines. Does that mean that they are entitled to have five magazines?

A. That's correct. Level 1s can have one newspaper on a one-for-one exchange and then five magazines. Of course, that would be a one-for-one exchange as well.

Q. The five magazines would have to be obtained through --

A. Subscription.

Q. So somebody on a regular Administrative Custody, did I understand you correctly on regular Administrative Custody in

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the RHU is not allowed to have magazines?

A. That's correct.

Q. Level 2 Long Term Segregation Unit inmates, are they permitted to have any magazines?

A. No.

Q. So there is no place on the unit that they can obtain a magazine, either from an officer or in the law library or from another prisoner who happens to be Level 1, there is no way that they can have any magazines in their cells under any circumstances; is that correct?

A. That's correct.

Q. What is the policy with respect to inmates on Level 1 of the Long Term Segregation Unit receiving articles from magazines that are sent in by relatives or friends or somebody else on the outside into the unit? In other words, something clipped from Time Magazine or Newsweek, are they allowed to receive those?

A. Yes.

Q. Would those articles be limited, as in the case of newspapers, to articles that have some personal connection to the inmate or some connection to his specific community?

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A. No.

Q. So they can receive clipped articles that deal with the Middle East or any other thing?

A. Yes.

(Whereupon, there was a brief interruption.)

MR. KRAKOFF: Why don't we go back on the record.

BY MR. KRAKOFF:

Q. Even though there is not a specific question, you can --

A. He's going to bring a list of the magazines that are subscribed to in the library.

He clarified one thing that may or may not be of interest to you. The newspapers and magazines, once they are ready to be discarded by the library, are provided to our SNU and the hospital and our clinic units. These are inmate populations that generally don't have access to the library.

Q. Which would be the Special Needs Unit for SNU?

A. Right.

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Q. The hospital, and what was the --

A. The other one is what we call the clinic, but it's actually our reception unit.

Q. These are where new inmates come into the system?

A. Right. They're segregated from our general population for a period of time. And the question you asked about the listings, there is no specific list by title that the LTSU inmates can review. How they go about obtaining the books is by subject matter, author, or if they know the title.

Q. So if they want a book about President Teddy Roosevelt, can an inmate request the staff? Is that the way they would do it?

A. There is a specific --

Q. Form?

A. This is the form. In fact, if you have the inmate handbook, you should have a copy of that form.

Q. Let me identify the inmate handbook by number, which is Plaintiff's Exhibit Number 9.

(Whereupon, the document was marked as Plaintiff's Exhibit No. 9 for

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identification.)

A. What is the date?

Q. October 4, 2000.

A. You have -- this has been - the handbook, inmate handbook, was revised in January of 2001. So this version is obsolete.

MR. KRAKOFF: Can I have that, Mr. Mericli, since there's been a more recent inmate handbook?

MR. MERICLI: For SCI Pittsburgh?

MR. KRAKOFF: Yes, for the Long Term Segregation Unit?

MR. MERICLI: For the Long Term Segregation Unit.

MR. KRAKOFF: Right.

MR. MERICLI: Okay.

BY MR. KRAKOFF:

Q. When did that come out?

A. January 2001.

Q. So that would be about five months after Plaintiff's Exhibit 9?

A. Well, there's some significant changes though. Okay?

Q. Yeah. I would like to see that.

MR. MERICLI: Do you have an extra

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copy?

THE WITNESS: I can make a copy of this one.

MR. MERICLI: That would be best. And if you can have two copies, one for me and one for him. Kathy should have gotten it for us.

MR. KRAKOFF: I don't think I have that.

MR. MERICLI: Okay.

THE WITNESS: I apologize. Mine may have some notes written in it.

MR. KRAKOFF: Why don't you --

MR. MERICLI: Get us a clean copy.

THE WITNESS: We'll get you a clean copy that doesn't have any of my scribbling in it.

BY MR. KRAKOFF:

Q. Is there anything -- while we're here, so I don't have to come back, is there anything that would relate to either magazines, photos, or newspapers, other than the fact that there is a form attached to it for ordering, that would be covered by that, any changes?

A. There is nothing of any substance in

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the handbook that wouldn't be covered by that chart that we looked at with regard to privileges.

Q. May I just see the form that is provided to inmates to order books from?

(Witness hands document to counsel.)

THE WITNESS: Let me get someone on the job to get -- we need two copies?

MR. MERICLI: Yes, please.

MR. KRAKOFF: Maybe what I'll do is make this a separate exhibit.

(Whereupon, a brief recess was taken.)

BY MR. KRAKOFF:

Q. I can just identify this.

A. I'll get you a copy of that as well.

Q. I'm going to identify this as Plaintiff's Exhibit 20.

(Whereupon, the document was marked as Plaintiff's Exhibit No. 20 for identification.)

BY MR. KRAKOFF:

Q. This comes from the revised Long Term Segregation Unit Rules and Regulations, Inmate Copy, dated January of 2001 which I'll be

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receiving sometime in the future. This is the last page of that document. It says RHU Law Library Book Request Slip. That's going to be Plaintiff's Exhibit 20.

How does this system work? What is the procedure for an inmate in the Long Term Segregation Unit to obtain a book from, if you know? Apart from, I take it, that the inmate fills out this document?

A. Right.

Q. It tells what kind of book or what category of book he wants?

A. Right.

Q. Or a specific title, if he knows it?

A. Right.

Q. And then somebody delivers that request slip --

A. The librarian assistant makes at least two trips to the LTSU weekly. They will pick up the slips, and a few days later the books should be delivered to the inmate.

Q. The inmates who are on Level 2 status in the Long Term Segregation Unit, they can participate in this book system; is that right?

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A. Yes.

Q. Is there a limit on the number of books an inmate is allowed to receive per week?

A. Two books.

Q. They can keep those in their cells. They can read them in their cells?

A. And they exchange it one for one.

Q. So they finish the first book. They start reading the second book, and they can in the meantime order another book?

A. That's correct.

(Whereupon, there was a brief 13 interruption.)

MR. KRAKOFF: Is this a clean one?

THE WITNESS: Yes.

MR. KRAKOFF: Pursuant to an agreement that we have, I'm not turning anything over without telling Mr. Mericli. I'm not giving anything to any of the inmates.

THE WITNESS: Please don't.

MR. KRAKOFF: No. No. If I assume down the line that there may be a need for me to share anything with the representative plaintiffs, Mr. Mericli will be informed of that fact.

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MR. MERICLI: And I can go to court.

MR. KRAKOFF: If we can't reach an agreement, but I'm not going to turn anything over, even if it appears to be innocuous.

MR. MERICLI: I want to say as well that I have had the pleasure of working with Mr. Krakoff in at this point, at least coming to the top of my head, three major cases where we had these confidentiality agreements, and they have never been breached.

THE WITNESS: We certainly appreciate that, because even though it may seem innocuous, oftentimes there are security and safety issues that are associated with the release of some of these documents.

BY MR. KRAKOFF:

Q. So that I understand though with respect to this document which will be marked Plaintiff's Exhibit 21, Long Term Segregation Unit Rules and Regulations, Inmate Copy, does that mean that the inmates receive these?

A. Absolutely. The day they get here, they get a copy of that.

Q. I'm still not going to turn this -- in fact, there is no need for me to turn this

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over to any of them, because they have --

A. They already have one. Right.

Q. This will not be turned over to them. This will be marked Plaintiff's Exhibit 21.

(Whereupon, the document was marked as Plaintiff's Exhibit No. 21 for identification.)

BY MR. KRAKOFF:

Q. Before we took a break, I was asking you about specific articles being cut out and sent into the Long Term Segregation Unit.

So that I understand correctly, Level 1 inmates can receive specific articles from friends or neighbors, relatives, any third person? They can receive specific articles from magazines through the mail; is that right?

A. Yes. So could a Level 2.

Q. And a Level 2 inmate who receives a specific article, I believe you testified that that article from a magazine doesn't have to relate to the inmate in any way? It can just be some general --

A. I think you got it reversed.

Q. Okay.

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A. The Level 2 inmate, there should be some nexus between the content of the article and the inmates.

Q. Okay. Level 1 inmate?

A. Level 1 inmate would be regardless of what the topic was. But because obviously they have access to a magazine, they have access to a newspaper, there is no -- there is no...

Q. So as I understand it then, the access of inmates on Level 2 status in the Long Term Segregation Units to specific magazine articles sent in from -- clippings sent in from third parties, that's much narrower than what the access that inmates on Level 1 would have to magazine articles; is that true?

A. Yes.

Q. It's much narrower and different than what inmates in a general prison population would be allowed to receive?

A. True.

Q. So the nexus to an inmate -- and I'm not going to ask you to give me every scenario, but it might be something about -- it could be an obituary about a relative dying that a Level 2 inmate would be allowed to receive; true?

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A. Uh-huh.

Q. Or maybe an article about one of his relatives that appears in the magazine that was cut out?

A. Uh-huh.

Q. But if it's about President Bush doing something or the stock market or something of just general interest to the community at large, that is not going to be available to the Level 2 LTSU inmate; correct?

A. Correct.

Q. The final topic of articles that I want to -- article is a poor choice of words. Items that I want to discuss

with you relate to photographs. We can go back to the chart or the attachment on Plaintiff's Exhibit 8.

An inmate in the RHU on Disciplinary Custody status, the garden variety, regular, I think is the way we're referring to RHU status as opposed to -- let me start again.

I'm focusing first on Disciplinary Custody in the regular RHU. Is an inmate permitted to have any photographs in his cell?

A. Yes.

Q. How many photographs is a regular

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RHU Disciplinary Custody inmate permitted to have while he's serving his disciplinary time?

A. Ten.

Q. Is an inmate on Disciplinary Custody status, regular RHU Disciplinary Custody status, is he permitted to bring photographs that were in his possession before he was transferred into Disciplinary Custody status, or is he required to receive those through the mail while he's in Disciplinary Custody status? Do you know what I'm saying?

A. I understand your question. I'm not sure I know the answer. I believe that they can bring photos from their cell, in their cell property, to the RHU.

Q. Do you know whether they're allowed to receive photographs after they have been placed --

A. Yes.

Q. -- in Disciplinary Custody?

A. Up to the limit of ten.

Q. So Mr. X is convicted of refusing to obey an order, is sentenced to the RHU, Disciplinary Custody status for 30 days or whatever. While he's in there, somebody can

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send a photograph in to him, and he's allowed to have that in his possession, assuming it doesn't violate any nudity provisions?

A. Right.

Q. Or other security matters; right?

A. That's correct.

Q. Do you know what the rule is with respect to the Special Management Unit inmates? I know you don't have one here.

A. Only what I can read here.

Q. Then I can read that. Then what about Administrative Custody inmates in the regular RHU? Are they permitted to have photographs?

A. Yes.

Q. How many?

A. Ten.

Q. They're permitted to either bring them in, to the best of your knowledge, or to receive them through the mail while they're in Administrative Custody?

A. Correct.

Q. The Level 1 Long Term Segregation Unit inmate, is that inmate allowed to have any photographs in his cell?
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A. No.

Q. And Level 2?

A. No.

Q. The photographs that the categories of inmates are permitted to have in their cells, we talked about in general prison population, Administrative Custody, and routine regular Disciplinary Custody, do those photographs have to be of the inmate's family or friends? By family, I mean relatives, a spouse, children, or friends; or can they be broader than that?

A. Is this in general population?

Q. Yes, in general population.

A. Actually, if they're allowable photographs, it doesn't matter.

Q. It can be of anything? It could be of a mountain?

A. Right.

Q. What about in the -- that was general population; correct?

A. Right.

Q. What about photographs for RHU, Disciplinary RHU, Administrative, can it be of anything?

A. They're allowed to have photos, and

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the photos are allowable by the 803. The subject matter of the photo doesn't matter.

Q. If a Long Term Segregation Unit inmate is found to have a photograph in his possession, either on his person or somewhere in his cell, is he subject to having that treated as contraband and the photograph taken from him?

A. Yes.

Q. What will happen to a photograph? I don't know if you have ever had that happen?

A. Yes.

Q. What happens to a photograph that's taken as contraband?

A. It's placed in his property.

Q. If a photograph is mailed in to an inmate at the LTSU, who is an occupant of the LTSU, what will happen to the photograph if – I assume that if the envelope is open and the mailroom employee sees that there is a photograph, sees that the person is in the LTSU, what happens to the photograph?

A. The photograph will go in the inmate's property.

Q. The inmate is not, while he is an LTSU prisoner, is not allowed to go to his

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property and look at those photographs; is that right?

A. The only reason would be occasionally inmates are allowed to go to their property to obtain different things; you know, to exchange a property or something like that. At that time they may, as they go through their property --

Q. They may glance at it?

A. Right.

Q. If an inmate said --

A. "Can I look at my pictures?"

Q. -- "Can I look at my pictures?"

A. No.

Q. Can't do that?

A. Right.

Q. Is an inmate --

(Whereupon, there was a brief 19 interruption.)

MR. KRAKOFF: Why don't I -- maybe you can help the deputy with various exhibits. What I'm going to do is I'm making reference to these exhibits. They're just going to be attached. I'm not offering. Obviously this isn't an evidentiary --

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MR. MERICLI: Sure.

MR. KRAKOFF: I'm going to probably attach most of them. 1 and 2 are the interrogatories and the answer. I'm not going to deal with those.

(Whereupon, Plaintiff's Exhibit No. 3 was marked for identification.)

BY MR. KRAKOFF:

Q. So Plaintiff's Exhibit 3, this is a grievance document addressed to Ronald Banks. It's from Carol?

A. Scire.

Q. She's the regular prison grievance officer?

A. She's the grievance coordinator. Right.

Q. You'll see this says, "The items that were confiscated were deemed not to be religious material by Deputy Dickson and the Chaplaincy Department. You are currently a Level 2 in the LTSU and are not permitted magazines or newspapers."

You may not remember the specifics of this. I refer you also to Plaintiff's Exhibit 4, which relates to the same matter.

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I'm not going to ask about what specific document was involved, but do you recall how the religious issue became involved? What relevance does whether something happens to be religious material have to the receipt of either a magazine or a newspaper, if any?

A. Well, procedurally, we go back to what is allowable and what is not allowable. Religious materials, if it's determined to be religious materials, an inmate can have up to the limit of his one records box of religious materials.

If there is a question as to whether or not an item constitutes a religious item, it's referred to the chaplain's office for review. And they then make that

determination that yes, this is in fact a religious document or not. One of the examples -- and I don't know if it's specifically this or not, because that was over a year ago.

Q. This was the Christian --

A. Christian Science Monitor.

Q. There were two things. One was the newspaper?

A. Right.

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Q. One was a magazine?

A. Yeah. And the magazine was determined to be a religious document, and he was permitted to have that. The Christian Science Monitor, as you know, is a secular newspaper; and it was not deemed to be religious material, and that was denied.

Q. So the magazine was allowed to come in --

A. That's correct.

Q. -- because it was religious in nature?

A. Right.

Q. The Christian Science Monitor, because it was a secular newspaper, was not allowed?

A. That's correct.

Q. So theoretically if -- I'm not asking you to make a decision in this case, but just so I understand it, if,

for example, somebody sends in the Watch Tower, I don't know if you're familiar with that?

A. Jehova's Witness document?

Q. Right. Something like that that might be considered religious in nature?

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A. I would assume that that would be legitimate religious material. We're not -- we don't -- we're equal opportunity here as far as that regard.

Q. There's another interest at stake here, and that is not so much the right to read in general, assuming there is such a right, but religious freedom is at issue?

A. Absolutely.

Q. You have something that may draw -- I assume that's what the distinction is, that this is something that because of the First Amendment right to engage in religious issues, you're going to make an exception to the general rule about magazines or books?

A. Correct.

Q. So a Bible can come in?

A. Right.

Q. A Koran can come in?

A. Right.

Q. And theoretically, I suppose, or at least arguably if there is a book that comments on the Bible written by some theologian, that may be able to come in, too?

A. Right.

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(Whereupon, Plaintiff's Exhibit No. 6 was marked for identification.)

BY MR. KRAKOFF:

Q. Plaintiff's Exhibit 6, this is a document that you apparently sent to LTSU inmates as a whole regarding "GRATERFRIENDS". It's dated February 8th, 2001. I take it that this is your signature?

A. I haven't seen it yet.

Q. I'm sorry. You'll see it will say Plaintiff's Exhibit 6.

MR. MERICLI: Here's 6. This is it.

BY MR. KRAKOFF:

Q. Is that your signature?

A. Yes, it is.

Q. "GRATERFRIENDS" as I understand it -- instead of my saying as I understand it, what is the publication "GRATERFRIENDS" in general? What kind of publication is that?

A. It's a newsletter that's published somewhere I believe in the Philadelphia area, and most of its contributors are inmates, for inmates.

Q. But it's published -- it's not

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actually publish at Graterford, for example?

A. No. No. I believe it may have had its genesis from inmates or inmates families in Graterford or whatever, but it's expanded.

Q. This is something that a fair number of inmates at SCI Pittsburgh who are in, say, the general prison population do receive "GRATERFRIENDS"?

A. Yes.

Q. Do you know whether this is subscribed to, or is this something that is just --

A. I honestly don't know.

Q. Does "GRATERFRIENDS" deal with, if you know -- have you ever looked at issues of "GRATERFRIENDS"?

A. Yes. The superintendent gets a copy, in fact, and he distributes it to the two deputies.

Q. Does this deal sometimes with prison-related, issues?

A. Oh, yeah.

Q. Does this ever deal with issues related to non-prison matters?

A. Yes.

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(Whereupon, Plaintiff's Exhibit No. 7 was marked for identification.)

BY MR. KRAKOFF:

Q. Now, Plaintiff's Exhibit 7, which will be in the next folder, this is a document issued June 8, 2000. It's a policy statement, 6.5.1, dated September 1, 2000. Do you know, is this the current policy statement?

A. Yes, it is.

Q. You'll note that it says on the second page of the document, it says Custody Level 5H (CL 5H)?

A. Correct.

Q. What custody level -- 5H is the custody level for Long Term Segregation Unit; isn't it? I think that's on page 3.

A. That's correct. It is.

Q. Is that the highest security level in the prison system?

A. Yes.

Q. Then Plaintiff's Exhibit 8 we have already made reference to.

A. I would say that's the highest classification, not incorporating capital cases.

Q. Plaintiff's Exhibit 8, which is a

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procedures manual dealing with administration of Security Level 5 Housing Units, is this the current policy?

A. Yes, it is.

Q. Plaintiff's Exhibit 9, which is that document we discussed before, the --

A. Right.

Q. -- October 4, 2000 LTSU handbook. Were you involved in the preparation of this handbook?

A. Yes.

Q. I can just take you through --

A. Do you want to go through this old version? It's kind of overcome by more recent documents. So...

MR. MERICLI: That would be the one that we have as Exhibit 21.

BY MR. KRAKOFF:

Q. I'm not going to question you about this.

(Whereupon, Plaintiff's Exhibit No. 13 was marked for identification.)

BY MR. KRAKOFF:

Q. If you can turn to Plaintiff's Exhibit 13, which is DC-ADM 802?

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A. This isn't the 802.

MR. MERICLI: Thirteen. That's 12. I'm sorry. I gave him the wrong exhibit.

BY MR. KRAKOFF:

Q. Does this essentially reflect current policy with some -- as I understand it, there have been a couple --

A. Numerous bulletins.

Q. Some bulletins since then?

A. Yes.

Q. Does this --

A. I would like to verify that.

Q. Okay. Maybe the way we can do it is, you can just relate to Mr. Mericli if anything -- we're only dealing here with newspapers, magazines, books, and photographs.

If any of this 802 has been revised in connection with those matters, then you can notify Mr. Mericli, and Mr. Mericli will either send me a copy of the policy bulletin, the changes, or he can just relate to me in a letter the changes. Would that be acceptable?

MR. MERICLI: Yes.

BY MR. KRAKOFF:

Q. Otherwise, I'm going to assume that

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this policy is current as to anything relevant in this case. Okay?

A. Uh-huh.

THE WITNESS: Is this a point at which I might bring out the 6.5.1?

MR. MERICLI: Yeah. I guess so. I thought he might ask you about it, but he didn't. There have been revisions -- there are proposed revisions to the 6.5.1 that are of some significance to the inquiry that you're making in this case.

There would seem to be, from our point of view, neither any restrictions on disclosing this information to you in terms of higher authorities in the DOC, nor any particular reason not to disclose it to you in connection with this case.

The only problem is that they are still not yet, so to speak, enacted or promulgated, and consequently may not appear in the forms in which they're being discussed right now.

MR. KRAKOFF: Why don't we do this. Why don't we go off the record, unless you would rather remain on the record.

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MR. MERICLI: It's up to you.

(Whereupon, a discussion was held off the record.)

(Whereupon, Plaintiff's Exhibit No. 14 was marked for identification.)

BY MR. KRAKOFF:

Q. Let me show you Plaintiff's Exhibit 14, which is ADM 803. This is dealing with inmate mail and incoming publications. Is this document still current, as far as you know?

A. I think we just got a revision of this.

Q. Maybe what we can do is there is no need for you to get that copied now, but maybe what we can do over the next couple of days is that if you can --

A. I'm going to give you the most recent 802 and 803.

MR. MERICLI: If you could send them through to me.

MR. KRAKOFF: I'll keep this here. You'll send it to Mr. Mericli, and he will send it on to me.

(Whereupon, a discussion was held off the record.)

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BY MR. KRAKOFF:

Q. The question I put to you is: First of all, does the Department of Corrections believe that there are any penological, institutional, or other governmental interests that are related to the policies that I have asked you about today -- namely, access by LTSU inmates, Level 2 -- to newspapers, magazines, to books and to photographs?

And I want to -- I'm just asking you that as a group. Is it the Department's position that these policies, each of these policies, relates to a penological, institutional, or some other governmental interest?

A. Yes. They have penological interest. You mentioned books, which I don't know is, you know, legitimately a part of that group, because I don't know--

Q. I agree with you. As I have found out more about the books, I don't know whether that's in the mix. I'm going to cover it in any event.

A. The penological interests are --

Q. Let's break this down so that we

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have this in kind of a neat -- what penological interest or interests are served, are related -- let me start this again, because it's very important.

Will you identify, with respect to the newspaper policies that governs receipt of newspapers and access to newspapers by Phase 2 prisoners, will you describe what penological interest or interests relate to that policy?

A. First, if I may, as I pointed out earlier, we're dealing with the one tenth of one percent of the inmates in the State population that have proven to be the most problematic and the most difficult behavior problems.

We have -- I'll start by saying I think there are three reasons why we have chosen to deny certain privileges to inmates in the Long Term Segregation Unit, and the key --

Q. If I may -- and I'm not going to interrupt you once more. I promise. So that we know, are the three reasons that you're about to describe, are those three reasons applicable to the newspapers, magazines, and photographs?

A. Yes, they are.

Q. So you're going to now identify the

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three penological reasons for those policies; is that right?

A. Yes.

Q. Okay.

A. The first and most important one is as a means of behavior modification. And by that, I mean that a privilege is an earned thing based on compliance and modification of negative behaviors.

I think that's the most important reason why we have these privileges and denial of these privileges, and obviously we are attempting to do the best we can to modify the inmate's behavior so that eventually he can become a more productive citizen; or in the fact that he's never going to leave an institutional setting, that eventually he may be able to integrate into the general population in the institution.

The second reason that we use this privilege system and denial of those privileges is that the denial or the reduction of property in the inmate's cell allows us to more carefully 24 and completely protect both staff and other inmates.

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And by, that I mean the more property an inmate has in his cell, the more capability he has to hide contraband or conceal items that he obviously should not have in his cell. So that's another reason for restricting these items.

The third reason is that it's been proven that these types of items in the hands of the wrong people can be used against staff or against other inmates as weapons or as items to inflict harm on other people, to the extent of rolling up a magazine and creating a blow gun, using items to fling feces or urine.

People obviously are less inclined to use their legal work or their religious materials for that purpose. But for cell fires and things like that, we try to limit, again, those types of items that could be used to create harm to themselves or others.

Those, basically, I think, are the three reasons that we have this system. And as point out, the inmates primarily that we have in the LTSU, being a very small fraction of our overall general -- or total population of inmates in the system have proven through their

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previous behaviors that these types of measures, while seeming extreme in your case, actually give us a means or method to say, "You comply, you modify your behavior, and you can obtain these things, these privileges." You know, you have the ability through your own actions to be promoted, if you will, from a Level 2 inmate to a Level 1 inmate, and we do that every day.

We have a system where the Unit Management Team reviews each inmate's progress every 30 days. The Unit Management Team is made up of the unit manager, custody staff, psych staff, nursing staff.

And we try to give and provide the inmate every opportunity to progress through this system and to be able to obtain these privileges.

We're very limited, as I pointed out, in what we can and cannot deny or give to an inmate, and these are some of the items that we feel are legitimate as incentives for inmate growth.

Q. With respect to the physical plant itself, other than the law library, are there any other rooms that would be available for an

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inmate to read a newspaper that he's ordered or a magazine?

A. Of course, if the inmate was authorized to have either of those items, he could certainly do it in his cell.

Q. Assuming he wasn't authorized, assuming that we're living in this same world, and then I could create a reading room where an officer removes a newspaper from either the personal property box or keeps it at the desk or whatever and then walks the inmate into this room, hands him the newspaper, gives the inmate an hour to read the newspaper or the magazine, is there any physical place in the LTSU Unit that could serve as a reading area?

A. No, not that I know of, other than the mini law library. I think that the point here is that a Level 2 inmate, based on his history and behavior -- of course, this is the most restrictive unit in the State with regard to movement, inmate movement.

Only one inmate's allowed out of his cell at a time under the escort of two officers. They are in hand and leg restraints in many cases and with the use of a tether.

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So, again, the privilege of being able to read a newspaper or a magazine is one that we view should be an earned privilege. And through an inmate's behavior, they can earn their right to have those items in his cell and read them at his leisure.

Q. Are phone calls in the unit made -- are the phones placed in the inmate's cell, or does the inmate leave his cell to make that phone call?

A. There are inmate-monitored -- or monitored telephones on the unit where an inmate would be brought out of his cell. There is also inmate telephone calls made from the counselor's desk, at which time, of course, they would be out of their cell and in the counselor's office.

Q. They are also taken out of their cells I think three times a week for showers?

A. That's correct.

Q. And they're also taken out of their cells, each inmate, assuming that they want to go --

A. Five times a week.

Q. -- five times a week for exercise?

A. Correct.

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Q. We talked about books earlier. Books are brought into the unit from the law library and given to--

A. From the regular library.

Q. I'm sorry. From the regular prison library. And those, as I understood it, those are given to level --

A. All levels, yes.

Q. So the weapons that you talked about that could be made from a newspaper could be made from paper taken from a book?

A. Well, the only books that are allowed on the unit are paperback books that are, of course, small in nature.

A newspaper can be rolled into a fine tube. It can be used to fish other items from other cells out in the common pod area. It could be rolled to -- actually made into a spear. Some inmates are very creative in the things they can do with these materials.

Q. Can this spear actually puncture skin or something?

A. You could poke out someone's eye, certainly.

Q. You say a soft cover. An inmate

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couldn't put that together and --

A. Much less likely.

Q. And that's because?

A. Because of the size of the item.

Q. I know you talked about the LTSU as essentially being the worst of the worst. Would that be a fair way of putting it?

A. Yes.

Q. But there are some very violent inmates in regular Administrative Custody Units at the prison, too. Is that not so?

A. That's true.

Q. Inmates in the Special Management Units can be extremely violent and creative as well in terms of using paper to manufacture weapons or to start a cell fire or to heave feces with?

A. I would say they have the talent to do that. But when they would demonstrate the proclivity for that behavior, they probably would be on their way to the LTSU.

Q. In the LTSU, are there feces heavers currently?

A. It's a cyclic kind of a thing, you know. There'll tend to be a rash of that type

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of behavior, and then it will die off for a while, and it may start again, but it's not constant. There's only, I would say -- it's certainly not all inmates either. There are a handful that participate in that.

Q. Those inmates who heave or are heaving not with newspapers or magazines, they're heaving with their hands; aren't they?

A. I would say there's any number of ways they do it. Oftentimes it's with the cups that they're given for their drinks, things like that, any type of container; or, as I say, a piece of a paper or whatever wrapped up that they can use to give a little leverage and fling the materials.

Q. They're allowed to have socks? They wear socks in the unit?

A. Sure.

Q. And they can heave feces with their socks?

A. Well, what I'm getting at is the materials that -- when you have a magazine that has a little bit of rigidity to it which gives you some additional thrust, if you will, whereas a sock is fairly, you know --

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Q. But a book, an entire book can give you that same sort of thrust; couldn't it?

A. Uh-huh. (Witness nodding head.)

Q. In terms of cell fires, are inmates permitted to have blankets in their cells?

A. Yes.

Q. Are those blankets fire retardant? Can they start a fire with a blanket if they lit the blanket?

A. I imagine they could.

Q. They have jump suits on that are flammable as well; don't they?

A. Yes.

Q. Do they have linen on their beds?

A. Yes.

Q. Bed sheets?

A. Yes.

Q. Are they given writing paper at all?

A. Yes.

Q. How much of that are they allowed to have in their cell?

A. Generally, ten sheets at a time.

Q. Are they permitted to have matches in their cell?

A. No.

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Q. But some of them do find ways of getting matches?

A. Yes, they do.

Q. Have there been any cell fires in the LTSU over the past six months?

A. Yes.

Q. Approximately how many? A. Within the last six months, I would say no more than two or three.

Q. Do you know what the nature of those -- how those fires started, what was used to --

A. Paper products generally are the way it's first ignited.

Q. Is it their writing paper?

A. I don't know.

Q. Do you know of any instance where an inmate who had a magazine in his cell who would have been a Level 1, or a newspaper, used those items for fire?

A. No.

Q. Wouldn't it be fair to say that if an inmate wants to start a fire, he could start a fire using writing paper in combination with a blanket or in combination with clothing or linen, bedding materials? He could do that;

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couldn't he?

A. Yes.

Q. If he wants to throw feces, he could use a cup for that; true?

A. Yes.

Q. Or if he wants to throw urine, he can use his cup to throw the urine?

A. Yes.

Q. Would you say that it would be fair to say that you have identified -- by you, I mean the officials -- on the basis of having these inmates in a cell block, you fairly well know those inmates who are prone to use their personal property in a violent sort of way, at least some of the inmates who -- and I know you can't be sure about these things, but there are at least some inmates in there who the officials would say, "Well, he probably would be somebody who would not use his newspaper, not use his magazine to do violence with"?

A. I think that's a fair statement, although I also would tell you that none of them are totally predictable.

Q. I understand that. Assuming that inmates were allowed to have -- and I'm just

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assuming for the sake of this deposition, that there were a change of policy. An inmate that was on Level 2 was permitted to receive a newspaper and read it between the hours of 9 o'clock and 12 o'clock in the afternoon and then had to return the newspaper.

That would pretty much address the issue of whether they're using newspapers to hide between the pages some item of contraband; wouldn't it? I mean, that newspaper could be checked when the officer gets it back and even thrown out?

A. True, but it wouldn't address the primary reason for the denial of these types of privileges, which is just that so it functions as a privilege, and, again, back to the rehabilitative or modification of the negative behaviors purpose and having a privilege and using it as a reward for positive conduct.

Q. Inmates on the LTSU Unit eat their meals inside the cells?

A. They do.

Q. Would the meals be passed through the pie hole?

A. Correct. Correct.

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Q. Is that on any sort of tray that they get their meals?

A. Yes.

Q What is the tray made of?

A. It's a hard plastic composition. It's a clear plastic material.

Q. When they pass through, does an inmate keep the tray as long as he's eating, and then he returns the tray?

A. That's correct.

Q. Along with --

A. With the lid.

Q. When an inmate is removed from the cell for any purpose, whether to go out to recreation or to consult with somebody in the prison hospital or for any other reason, to make a phone call, do they have to be -- are their hands shackled?

A. Yes.

Q. That's done by putting their hands behind their back?

A. Yes.

Q. Through the pie hole?

A. Yes.

Q. So they're shackled behind their

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back?

A. Yes.

Q. What about their legs? Are those shackled?

A. Generally not on the unit itself, but depending upon -- if, for instance, the inmate has exhibited some assaultive behavior, yeah.

Q. If I understand, if an inmate either recently exhibited assaultive behavior or has been historically somebody when he's removed from his cell is problematic, that inmate in a particular circumstance --

A. Right. Yes.

MR. KRAKOFF: I think that completes my examination, if I may have three seconds.

(Whereupon, a brief recess was taken.)

MR. KRAKOFF: That will conclude the deposition unless there is something --

THE WITNESS: Just to give you an idea, this is the August schedule for A-3 as far as the library goes. That's how it works up there. This is the listing of magazines that are --

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MR. MERICLI: We'll make these 22 and 23.

MR. KRAKOFF: 22 will be the August 2002 calendar dealing with book deliveries on the unit, and 23 will be -- it's two-sided. It's a document that reflects magazines that are in the main prison library.

(Whereupon, the documents were marked as Plaintiff's Exhibit Nos. 22 and 23 for identification.)

MR. KRAKOFF: That's fine. That's all. I appreciate it.

(Whereupon, signature was waived.)

(Whereupon, this deposition was concluded at 1:01 p.m.)

[Reporter's Certification omitted in printing]

(5)

No. 04-1739

IN THE

Supreme Court of the United States

JEFFREY BEARD,
Petitioner

v.

RONALD BANKS,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does a prison policy that denies newspapers, magazines, and photographs to the most difficult inmates in the prison system in an effort to promote security and good behavior violate the First Amendment under the standards of *Turner v. Safley*, 482 U.S. 78 (1984) and *Overton v. Bazzetta*, 539 U.S. 126 (2003)?

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OPINIONS BELOW

The decision of the Court of Appeals is reported at 399 F.3d at 134 and is reprinted in the appendix to the Petition for Certiorari (Pet. App.) at 1a. The decision of the District Court is not reported, but is reprinted at Pet. App. 32a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 25, 2005. A petition for rehearing was timely filed and was denied on March 22, 2005 by a vote of 6-5. Pet. App. 30a-31a. The petition for certiorari was filed within 90 days thereafter, on June 20, 2005. The Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST., Amend. I.

STATEMENT OF THE CASE

This is a class action by a group of state prisoners challenging the conditions of confinement in the Long Term Segregation Unit operated by Pennsylvania's Department of Corrections. The Long Term Segregation Unit (LTSU) is a small unit, specifically designed to house those prisoners who are the "worst of the worst," that is, those prisoners with the very worst behavioral histories in the prison system. The incorrigible prisoners assigned to the LTSU lose a variety of privileges, which they may earn back by their behavior; among the privileges lost is access to non-religious

newspapers, magazines and photographs. The issue is whether this restriction violates these prisoners' First Amendment rights, under the standard articulated by the Court in *Turner v. Safely*, 482 U.S. 78 (1984), and *Overton v. Bazzetta*, 539 U.S. 126 (2003).

1. a. The LTSU is the most severe of a series of disciplinary regimes with which the Department of Corrections responds to prisoner misconduct. Lesser infractions, such as smoking in a prohibited area or failing to report to work, may be dealt with by the loss of specific privileges – television, commissary, visitation, and so forth – while the prisoner himself remains in the general prison population.[1] Serious or repeated misconduct, however, such as murder, assault, or possession of drugs, may result in placement in one of several special, and increasingly severe, housing units.

Thus, each prison has a Restricted Housing Unit (RHU), to which prisoners may be assigned for up to ninety days for each infraction. Among other restrictions, prisoners in an RHU spend 23 hours a day in their cell. They are not permitted tobacco, radio or television; are permitted only one (non-contact) visit per month and only from their immediate family; and are allowed to purchase only toilet articles from the prison commissary.[2] J.A. 102. They may, however, have one newspaper and ten photographs in their cell.[3]

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[1] *See* PA. DEPT. OF CORRECTIONS, Policy Statement DC-ADM 801, "Inmate Discipline," §§ VI.D, VI.J, *available at* http://www.cor.state.pa.us/standards/lib/standards/DC-ADM_801_Inmate_Discipline.pdf (visited Dec. 23, 2005).

[2] Prisoners who are in the general population are permitted to have tobacco, and to have radios and televisions in their cells. They may have at least one contact visit per week with anyone on their approved visitors list; and may spend up to $45 per week to buy a wide variety of snacks, toiletries and other personal items at the commissary. *See* (continued ...)

The Department of Corrections has also established two Special Management Units (SMU's) to house prisoners who are "continually disruptive, violent, dangerous, or a threat to the orderly operation of their assigned facility." J.A. 85. The SMU's are multi-phased programs, structured to "to change or modify behaviors to a more acceptable level." J.A. 136. At the beginning, most restrictive level, prisoners in an SMU are subject to the same restrictions they would face in an RHU. In addition, they face more severe restrictions on their commissary privileges – they are permitted to buy only writing materials – and they lose their magazine privileges entirely. They are still, however, permitted to have one newspaper and ten photographs, J.A. 102. By modifying their behavior, they can progress from one SMU level to another, through five levels, regaining privileges as they progress. J.A. 86-88.

b. The last stop on the disciplinary continuum is the LTSU. Prisoners eligible for the LTSU include those who have an escape history, who have a predilection for

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PA. DEPT. OF CORRECTIONS, Policy Statement DC-ADM 812, "Inmate Visiting Privileges," §VI.A, *available at* http://www.cor.state.pa.us/standards/lib/standards/DC-ADM_812_Inmate_Visiting_Privileges.pdf (visited Dec. 23, 2005); PA. DEPT. OF CORRECTIONS, Policy Statement DC-ADM 815, "Personal Property, Basic State Issued Items and Commissary," Approved Master Commissary List, *available at* http://www.cor.state.pa.us/standards/lib/standards/DC-ADM_815_Personal_Property-_Basic_State_Issued_Items-_and_Commissary.pdf (visited Dec. 23, 2005).

[3] The record is not entirely clear on what, if any, magazines prisoners in the RHU may have. One witness testified that they are not permitted to have any. J.A. 162. *But see* DC-ADM 801, "Inmate Discipline," *supra*, § VI.M (prisoner in disciplinary custody may have up to ten magazines).

assaultive behavior with an intent to cause death or serious injury, or who otherwise present a serious threat to prison security: prisoners, for example, who have engaged in or instigated riots, who are members of prison gangs, or who have a history of sexual predation. J.A. 85-86. Simply put, the LTSU was designed to house the most recalcitrant and incorrigible prisoners in Pennsylvania's prisons. As a practical matter, most of the prisoners assigned there have "flunked out" of an SMU, and thus have few privileges left to lose. J.A. 136-137.

The LTSU, like the SMU's, is a multi-phase program aimed primarily at behavior modification. J.A. 124-125, 189. Prisoners begin at Level 2,[4] the most restrictive level, where they face the same restrictions as in the most restrictive level of an SMU. In addition, they lose all commissary privileges, and are not permitted to have any newspapers or photographs. They are, however, allowed to have religious reading material in their cell, and they may order recreational reading from the prison library. They are permitted legal and personal correspondence, which may include newspaper or magazine articles having some personal connection to the prisoner. J.A. 102, 154-155. They are allowed monthly visits with family members, and may receive unlimited visits from legal counsel. J.A. 98-99. They receive daily visits from a Facility Chaplain. J.A. 100. And they may visit, one at a time, the mini-law library maintained in the LTSU.[5] J.A. 157.

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[4] The text describes the LTSU program as it existed at the time of the district court proceedings. Currently, the LTSU comprises four levels rather than two, but there has been no material change in the restrictions imposed at the beginning, most restrictive level.

[5] For security reasons, the mini-law library seats only one prisoner at a time. *See* J.A. 191 (only one LTSU prisoner at a time may leave his cell).

The restrictions imposed upon prisoners in the LTSU, including the restrictions on newspapers, magazines and photographs, are essentially a program of behavior modification, aimed at the behaviors which have the most potential to undermine individual and institutional security. By treating access to newspapers and magazines as a privilege to be earned (or retained), the LTSU program provides an incentive for good behavior and a deterrent to bad behavior. The recalcitrant prisoners who are already in the LTSU are encouraged to change their behavior and begin progressing toward reintegration into the general prison population and, if their sentences permit, into civil society; while prisoners who are not in the LTSU are encouraged-to continue their good behavior so as not to lose their privileges. The LTSU program thus simultaneously serves the interrelated penological goals of rehabilitation and security. J.A. 135-137, 188-190.

The restrictions on newspapers and magazines also further prison security within the LTSU even apart from their role in modifying behavior. First, the less property these dangerous prisoners have in their cells, the more difficult it is for them to hide contraband among their possessions. Second, both newspapers and magazines can be fashioned into crude tools and weapons, and provide material for starting cell fires. J.A. 189.

Prisoners remain at Level 2 for at least ninety days. J.A. 32. At that time, and every thirty days thereafter, their progress is reviewed by a committee who, applying prescribed criteria, can recommend promotion to the less restrictive conditions of Level 1. J.A. 40, 88-89. At Level 1, prisoners are permitted one newspaper and five

magazines.[6] Prisoners may be released from the LTSU altogether at any time, to an SMU, an RHU or into the general prison population; and they are considered for such release at least annually. J.A. 41. But if a prisoner's behavior fails to improve, he may be held at the LTSU indefinitely.

The LTSU was established in April of 2000, and was located within the State Correctional Institution at Pittsburgh.[7] J.A. 123. It is a small unit, capable of housing a maximum of forty-eight prisoners but ordinarily housing no more than forty, or about one-tenth of one percent of the total prison population. J.A. 127, 136, 188. In August of 2002, for example, it housed thirty-nine prisoners, of whom thirty-six were in Level 2 and three were in Level 1, although typically the proportion in Level 1 is somewhat higher. J.A. 130-131. Another ten prisoners had "graduated" out of the LTSU altogether. J.A. 138.

The LTSU holds "extremely disruptive, violent and problematic inmates," and is therefore an area of "extremely high levels of security." J.A. 80-81 Prisoners ordinarily spend 23 hours a day in their cells; and for a prisoner to leave his cell – for example, to visit the mini law library – requires an escort of two corrections officers. Only one LTSU prisoner at a time may leave his cell, wearing handcuffs and leg irons and tethered to one of his two escorts. J.A. 191.

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[6] Level 1 prisoners are also permitted to spend $5 per week on commissary items, and may receive two visits per month instead of one. J.A. 102.

[7] The LTSU is now located within the State Correctional Institution at Fayette, about fifty miles south of Pittsburgh, near Brownsville in Fayette County, and thus still within the Western District of Pennsylvania. *See* J.A. 3 (certifying class of present and future LTSU prisoners "within the Western District of Pennsylvania").

2. Respondent Ronald Banks brought this action pursuant to 42 U.S.C. § 1983 against the petitioner, the Secretary of the Pennsylvania Department of Corrections, challenging the constitutionality of the policy denying entry-level inmates of the LTSU access to newspapers, magazines and photographs, and seeking declaratory and injunctive relief. The District Court certified a class comprising all prisoners within the Western District of Pennsylvania who are or will be confined in Level 2 of the LTSU.[8] J.A. 3. After the completion of discovery, the parties filed cross motions for summary judgment. Pursuant to the District Court's local rules, the petitioner filed, along with his motion, a statement of undisputed material facts. J.A. 25. Respondent did not respond to this statement or file a similar statement of his own, and the facts stated by the petitioner were therefore deemed admitted under the local rules.[9]

The District Court granted petitioner's motion for summary judgment and denied that of the respondent.[10] The District Court, applying the four-part analysis of *Turner v. Safley*, 482 U.S. 78 (1984), first held that the challenged policy is rationally related to

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[8] Banks himself left the LTSU in July of 2005, and is currently housed in a Restricted Housing Unit at another prison.

[9] The Local Rules of the Western District of Pennsylvania require a party opposing a motion for summary judgment to file a responsive statement admitting or denying each fact, and setting forth the basis for each denial. All facts presented by the moving party not controverted in this way "will, for the purpose of deciding the motion for summary judgment, be deemed admitted...." L.R. 56.1(C)(1), (E).

[10] The District Court adopted as his own the report and recommendation of the Magistrate Judge to whom the motions had been referred. Pet. App. 32a.

the legitimate penological goals of rehabilitation and prison security. Pet. App. 37a-41a. The policy encourages compliance with prison rules by especially obdurate intractable prisoners, by using access to newspapers, magazines and personal photographs as an incentive for their good behavior. Pet. App. 39a. By depriving especially dangerous and difficult prisoners of materials they could use to fashion crude weapons or to start cell fires, the policy also rationally advances prison security. Pet. App. 40a-41a. The District Court thought it rational to conclude, as a matter of security, that inmates would be more likely to use magazines and newspapers for illicit purposes than legal papers and religious texts they were permitted to have in their cells. Pet. App. 40a. The District Court did not think the rationality of the policy was undermined by the fact that recalcitrant and dangerous prisoners in other segregation units were not completely deprived of periodicals. LTSU inmates had not progressed in other, less restrictive programs, and the District Court believed it "not only rational to impose more restrictive conditions in an effort to encourage compliant behavior but imperative to the success of the LTSU." Pet. App. 40a.

The District Court also held that inmates have alternative means of exercising their rights: first, by modifying their behavior so as to be assigned a custody status which entitles them to newspapers, magazines, and photographs, and second, by visitation and correspondence. Pet. App. 41a-42a. And he concluded that accommodating their interest was not reasonably possible: "[H]aving already found ample evidence to support a finding that access to magazines, newspaper, and photographs presents a threat to the security of both guards and other prisoners in the LTSU, it appears that accommodating plaintiffs' asserted right would have the very 'ripple effect' referred to in *Turner* ...." Pet. App. 43a. Finally, the District Court rejected the idea that there were 'ready alternatives" to the

challenged policy, such as providing inmates with reading periods. This suggestion, the District Court said, would not alleviate the security concerns occasioned by newspapers and magazines and "would not be without sacrifice to the prison's behavioral modification goals." Pet. App. 45a.

3. A divided panel of the Court of Appeals reversed the District Court's judgment. While the Court of Appeals likewise applied the four-part *Turner* standard, the Court of Appeals did not mention the Court's more recent decision in *Overton v. Bazzetta*, 539 U.S. 126 (2003).[11] Moreover, in applying *Turner*, the panel majority disagreed with the District Court's conclusions at virtually every turn.

a. The panel majority acknowledged that "the deterrence of future infractions of prison rules can be an appropriate justification for temporarily restricting the rights of inmates," but noted that "the [petitioner] has offered no evidence that the rule achieves or could achieve its stated rehabilitative purpose." Pet. App. 12a, and thought it "unclear how the policy would achieve the deterrence that it seeks", Pet. App. 11a-17a, in view of the indefinite period of confinement in the LTSU and the discretionary nature of decisions regarding custody status. The majority also discounted the prison officials' security concerns because "there [was] no evidence in the record of the misuse of periodicals or photographs in any of the ways described by the DOC," Pet. App. 14a.[12] The majority also thought that, because LTSU

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[11] The Court decided *Overton* in June of 2003, six months after the District Court's decision in this case, and more than a year before the decision of the Court of Appeals.

[12] For example, the majority acknowledged the evidence that cell fires had in fact been started in the LTSU, and that paper products had been used to start them, Pet. App. 15a n. 11, but criticized the lack of evidence that "particular fires" (continued ...)

prisoners could commit similar misbehaviors with other materials, Pet. App. 16a-17a, the ban on papers, magazines and photographs "may be too attenuated to be reasonable." Pet. App. 17a.

The majority also rejected the District Court's conclusion that inmates have alternative means of exercising their rights. The majority defined the right in question as a "First Amendment right of access to a reasonable amount of newspapers, magazines and photographs," Pet. App. 20a, and found that the policy's "blanket prohibition" left no way for prisoners to exercise that "right." Pet. App. 19a-20a. Thus, the "blanket prohibition" on photographs left prisoners with "no way to look at images of loved ones," and the availability of actual visits from those loved ones was not, in the majority's view, a satisfactory alternative. Pet. App. 19a. The majority rejected the possibility that LTSU prisoners could regain their privileges by simply modifying their behavior because "segregation in Level 2 is not linked to a particular infraction and is of potentially unlimited duration," Pet. App. 19a-20a, and because there were no affidavits in the record from those who made decisions regarding custody level or documentation of the review process. Pet. App. 20a.

Turning to the last two elements of the *Turner* standard, the panel majority thought that the prison could accommodate the prisoners' interests by establishing "reading periods" during which corrections officers could deliver, and then retrieve, newspapers and magazines, or by escorting prisoners individually to

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had been started with these specific materials, Pet. App. 14a-15a, or that LTSU prisoners had a specific history of misusing them, Pet. App. 15a, and the lack of specific testimony "as to the effect such a ban has had on the frequency of fires, be it in the LTSU or elsewhere." Pet. App. 15a.

a secure mini library "to read a periodical of their choosing." Pet. App. 22a-24a. The majority "fail[ed] to see" Pet. App. 23a, 24a, how these alternatives could be thought either burdensome or dangerous. Finally, the majority rejected the idea that extending these privileges to LTSU prisoners would impose "more than a *de minimis* cost" to the program's goal of behavior modification, because prison officials could still seek that goal by granting and withholding other privileges. Pet. App. 25a.

b. Judge Alito dissented because he thought the panel majority had misapplied *Turner*, "a standard that instructs courts to extend considerable deference to judgments of correctional officials." Pet. App. 26a. In Judge Alito's view, each of the four *Turner* factors counseled in favor of upholding the challenged policy.

Judge Alito thought that it was rational for corrections officials to think that inmates who are not in Level 2 will be deterred from engaging in serious misconduct because they do not want to be transferred to that unit and thus be subjected to the restrictions that accompany that assignment." Pet. App. 26a. "It is also 'rational'," Judge Alito continued, "for corrections officials to think that inmates who are in Level 2 will be deterred from engaging in serious misconduct while in that unit because they wish to be transferred out and thus to escape such restrictions." Pet. App. 26a-27a. He also thought that the majority, in demanding empirical evidence to support the policy, had misconstrued the nature of the first *Turner* factor:

> This factor requires us to determine whether there is a '*logical connection* between the regulation and the asserted goal,' *see* 482 U.S. at 89 (emphasis added), not whether there is empirical evidence that the regulation in fact serves that goal. The entire system of prison discipline might be imperiled if each sanction for prison misconduct could not be

sustained without empirical evidence that the sanction provided some incremental deterrent.

Pet. App. 27a-28a.

Judge Alito thought that the second *Turner* factor – alternative means of exercising the right – was the "most troubling," but still not sufficient to "support the majority's conclusion that the regulations are facially invalid." Pet. App. 28a. Judge Alito found it significant that inmates in Level 2 could still read books and receive letters, and had the option of modifying their behavior so as to be promoted to Level 1. *Ibid.*

Finally, as to the availability and impact of accommodation, Judge Alito thought that the modifications to prison policies proposed by the majority would be, at best, "time consuming," Pet. App. 29a, and at worst would impose a "significant burden" in the handling of the "most violent and disruptive" prisoners. *Ibid.*

4. The full Court of Appeals denied petitioner's request for *en banc* rehearing, by a vote of 6-5.

SUMMARY OF ARGUMENT

Crystallizing the principle that courts must accord substantial deference to the judgment of prison administrators, the Court in *Turner v. Safely*, 482 U.S. 78 (1987), articulated the now-familiar rule that, "[w]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. This principle of deference, the Court has said, applies with special force when applied to policies which pertain to inmates with special disciplinary and security problems. *Lewis v. Casey*, 518 U.S. 343 (1996).

The respondent in this case represents a prisoner class - LTSU Level 2 inmates - whose histories of violent and disruptive prison behavior necessitate their confinement at the highest level of security. They challenge, on First Amendment grounds, a policy that denies Level 2 inmates access to non-religious periodicals and photographs. That policy, however, is clearly constitutional; applying the four factors that *Turner* recites as relevant to the "reasonable relationship" inquiry establishes that the policy is reasonably related to the legitimate penological objectives of prisoner rehabilitation and prison security.

1. Aimed primarily at behavior modification, the policy is logically connected to the interrelated goals of rehabilitation and security; it encourages Level 2 inmates to improve their behavior and begin progressing toward reintegration into the general prison population, while discouraging other inmates from behavior that could cause their assignment to Level 2. The policy also reduces the opportunity for further misconduct by Level 2 inmates.

2. Level 2 inmates retain ample alternative means of receiving information and communications from the outside world: they are allowed monthly visits from family members and unlimited visits from counsel; they are visited daily by a Facility Chaplain; they may order books from the prison library; and they may correspond with family and friends. They can also improve their behavior and regain access to periodicals upon transfer to Level 1 and access to photographs upon transfer from the LTSU.

3. Accommodating the asserted right would compromise the purpose of the LTSU. Level 2 inmates are the highest-security prisoners in the Pennsylvania prison system, at the apex of a progressive discipline regime where few privileges remain. Accommodation would diminish the severity of Level 2, reducing its

value both as a deterrent to serious misconduct by other inmates and as a means of reforming Level 2 inmates so they can rejoin the general population as less a threat. Accommodation would also increase the risk to LTSU guards and other prison staff who must enter the unit.

4. Accommodations suggested by respondent, such as a specified reading period, could not be accomplished without substantial costs, in the form of increased demands on personnel resources and increased security risks.

In the closely similar case of *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Court upheld, against a First Amendment challenge, a prison policy that withdrew visitation privileges for at least two-years from prisoners with two or more substance abuse violations. Applying *Turner*, the Court concluded that "withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose." *Id.* at 134. The Court found it a sufficient alternative that prisoners could still communicate with persons outside the prison by letter and phone, and rejected suggested accommodations, such as shortened visitation periods, as not "go[ing] so far toward accommodating the asserted right with so little cost to penological goals that they meet *Turner's* high standard." *Id.* at 136.

The Court of Appeals, in a divided-panel decision, grossly misapplied the *Turner* factors, disregarded the principle of deference on which they rest, completely ignored *Overton*, and assigned no significance whatsoever to the special disciplinary, high-security context from which this case arises. Contrary to the Court's direction in *Turner*, *Overton* and numerous other decisions, the panel majority subjected the challenged policy to an exacting and hostile scrutiny,

imposing on prison officials, rather than the prisoners, the burden of proving that the policy is valid. Its decision should be reversed.

ARGUMENT

I. The Court Of Appeals Subjected Pennsylvania's Policies To An Exacting and Hostile Scrutiny Which Is Contrary To This Court's Decisions.

A. In assessing the constitutionality of restrictions upon prisoners, the Court has consistently required deference to the judgment of prison officials.

The Court has long recognized that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). Prisoners "clearly retain" the protections of the Constitution, including those afforded by the First Amendment. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). Nevertheless, those rights are not unlimited: "Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration." *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003). Prisoners' constitutional rights are limited both by "the fact of incarceration" and by "valid penological objectives — including deterrence of crime, rehabilitation of prisoners and institutional security." *O'Lone*, 482 U.S. at 348.

The Court has likewise long recognized that prison officials face "Herculean obstacles" to the discharge of their responsibilities, which require "expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Procunier v. Martinez*, 416 U.S. 396, 404-

405 (1974). That "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," the Court has said, "reflects no more than a healthy sense of reality." *Id*, at 405.

Accordingly, the Court has "often said" that in balancing these factors, "the evaluation of penological objectives is committed to the considered judgment of prison administrators, 'who are actually charged with and trained in the running of the ... institution.'" *O'Lone*, 482 U.S. at 349, *quoting Bell v. Wolfish*, 441 U.S. 520, 562 (1979). The Court has accorded prison officials "wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. at 547 (citations omitted). Absent "substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations," the Court has said, "courts should ordinarily defer to their expert judgment in such matters." *Id.*, at 548 (citation omitted).

In *Turner v. Safley*, the Court, crystallizing these principles, articulated a standard of review "that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'" *Id.* at 85, *quoting Procunier v. Martinez*, 416 U.S. at 406. Recognizing that subjecting the daily decisions of prison officials to a strict scrutiny analysis "would seriously hamper their ability to anticipate security problems" and to "adopt innovative solutions to the intractable problems of prison administration," *Turner*, 482 U.S. at 89, the Court instead stated a more flexible rule: "[w]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Ibid.* This less restrictive standard was necessary, the Court

emphasized, if "prison administrators . . . and not the courts [are] to make the difficult judgments concerning institutional operations." *Ibid.* (internal quotations and citations omitted).

To determine whether a prison regulation is "reasonably related to a legitimate penological interest," *Turner* and its progeny have explained that four factors are relevant. First, "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* at 89 (internal quotations and citations omitted). In this regard, "[w]e must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton*, 539 U.S. at 132. Thus, prison officials need not produce evidentiary proof that a challenged regulation will or has been actually effective in accomplishing those goals; all that is required is "a *logical* connection," *Turner*, 482 U.S. at 94 n.* (emphasis in original), between the two.

Second, a court should determine "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. The absence of such alternatives does not necessarily condemn a regulation, but is "properly considered a factor in the reasonableness analysis." *O'Lone*, 482 U.S. at 349 n. 2; *Overton*, 539 U.S. at 135. In any event, the "right" in question must be viewed "sensibly and expansively," not narrowly. *Thornburgh v. Abbott*, 490 U.S. 401, 417 (1989). *See, e.g., Turner*, 482 U.S. at 92 (ban on inmate-to-inmate correspondence did not deprive prisoners of "all means of expression"); *O'Lone*, 482 U.S. at 352 (regulation preventing attendance at particular religious ceremony did not deprive prisoners of "all forms of religious exercise").

The third factor is "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; in the prison environment, "few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order." *Turner*, 482 U.S. at 90. Finally, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Ibid.* This, the Court emphasized in *Turner*, is *not* a "least restrictive alternative" test, *ibid*; indeed, the Court specifically rejected any regime in which every administrative judgment "would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Turner*, 482 U.S. at 89. But an "obvious, easy alternative" that "accommodates the prisoner's rights at *de minimis* cost to valid penological interests" may be evidence that the regulation is an "exaggerated response to prison concerns." *Id.*, at 90-91.

Since the *Turner* decision was announced, the Court has termed it "a unitary, deferential standard for evaluating prisoners' constitutional claims," *Shaw v. Murphy*, 532 U.S. 223, 121 S.Ct. 1475, 1479 (2001), and, although the standard is "not toothless," *Thornburgh v. Abbott*, 490 U.S. at 414, the Court has consistently made clear that it commands substantial deference to the judgment of prison administrators. In fact, the Court has said that *Turner*'s principle of deference has "special force" when applied to policies, as here, which pertain to inmates with special disciplinary and security problems. *Lewis v. Casey*, 518 U.S. 343, 361 (1996). *See Procunier v. Martinez*, 416 U.S. at 413 n. 12 (striking down regulations censoring prison mail, but not reaching validity of "temporary prohibition of correspondence ... as a disciplinary sanction").

In the twenty years since it was decided, the Court has applied *Turner* to sustain a number of prison regulations against challenges based on the First Amendment. In *Turner* itself, of course, the Court held that a regulation restricting correspondence between inmates was constitutional,[13] and in *Turner*'s companion case of *O'Lone v. Shabazz*, the Court upheld regulations limiting the ability of Muslim inmates to attend Friday religious services, "reaffirm[ing] our refusal, even where claims are made under the First Amendment, to 'substitute our judgment on . . . difficult and sensitive matters of institutional administration.'" 482 U.S. at 353, *quoting Block v. Rutherford*, 468 U.S. 576, 588 (1984).

In *Thornburgh v. Abbott*, 490 U.S. 401 (1989), the Court considered and upheld regulations that prevented inmates from receiving publications found by a prison warden to be detrimental to prison security. The Court concluded that the regulation was logically related to security concerns, and that alternative means of exercise were available because the regulation permitted a broad range of other publications to be sent and received. The Court went on to say that the right in question could not be accommodated without "significantly less liberty and safety for everyone else," since the regulation proscribed only publications which were a threat to the order and security of the prison. *Id.* at 418. Finally, the Court rejected proposed alternatives to the rule – such as tearing out the rejected portions and admitting the rest of the publication – refusing to second-guess the prison officials' view that this procedure would cause "more discontent than the current practice." *Id.* at 419. The Court said, "[w]hen prison officials are able to demonstrate that they have

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[13] The Court also struck down a regulation that restricted inmates from marrying other inmates or civilians without permission of the prison superintendent.

rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm, they succeed in demonstrating that the alternative they in fact selected was not an 'exaggerated response' under *Turner*." *Id.*

Most recently, in *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Court considered the constitutionality of prison regulations that imposed various restrictions on inmates' visitation privileges, one of which banned visits from family and friends, for at least two years, for prisoners who had committed certain disciplinary infractions.[14] The District Court and the Court of Appeals had held that the regulation impermissibly infringed the inmates' First Amendment right of association, but the Court disagreed. It emphasized again that it was proper to "accord substantial deference to the professional judgment of prison administrators," and that "the burden . . . is not on the state to prove the validity of prison regulations but on the prisoner to disprove it." *Id.* at 132. Applying *Turner*, it concluded that the regulation banning visitation for substance abusers served a legitimate purpose: "withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to

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[14] The two-year ban was imposed upon prisoners with two or more substance-abuse violations. Visits from clergy and attorneys were permitted. *Overton*, 539 U.S. at 130. The Court also reviewed, and approved as constitutional, restrictions on non-contact with minor nieces and nephews and children as to whom parental rights had been terminated; on inmate visits with former inmates, a regulation which required children visiting the prison to be accompanied by a family member or legal guardian. *Id.*, at 129-130.

lose." *Id.* at 134. The Court further concluded that prisoners subject to the ban had alternative means of exercising their rights, since they could still communicate with those outside the prison by letter and by phone. With respect to the availability of "ready alternatives," the Court refused to second guess the prison officials, rejecting arguments that the duration of the visitation restriction could be shortened or only imposed on the most serious violators, saying that "these alternatives do not go so far toward accommodating the asserted right with so little cost to penological goals that they meet *Turner's* high standard." *Id.* at 136.[15]

B. The Court of Appeals failed to adhere to this standard.

The Court of Appeals' approach to this case was a far cry from the deferential review required by *Turner*, *Overton*, and the other cases just discussed. The Court of Appeals got off on the wrong foot from the start, beginning its analysis with the observation that "in some cases" the constitutional rights of prisoners "may" be limited, Pet. App. 8a, thus implying that such limitations are the exception rather than the rule. But, at least in the First Amendment context, surely the reverse is more nearly true. A prisoner retains only "those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system," *Pell v. Procunier*, 417 U.S. 817, 822 (1974); and as the Court's cases demonstrate, there are few aspects of First Amendment rights that may *not* be limited by imprisonment. *See Overton* (freedom of association), *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977)(same); *Shaw v. Murphy*, 532 U.S. 223

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[15] The Court also concluded that accommodation would cause a significant reallocation of financial resources.

(2001)(correspondence); *Turner* (same); *Lewis v. Casey* (access to courts); *Thornburgh v. Abbott* (incoming publications); *O'Lone v. Estate of Shabazz* (attendance at religious services).

The Court of Appeals then purported to apply the *Turner* standard to Pennsylvania's policy, while ignoring the principle of deference to the judgment of prison officials which animates *Turner* and this Court's other cases. In fact, the Court of Appeals mentioned deference only once, in passing and limited to the idea that prison officials should receive "significant deference" in "interpreting" and "implementing" their own regulations. *See* Pet. App. 8a. The Court of Appeals did not mention this Court's repeated admonitions that such deference must also be exercised in assessing the constitutionality of such regulations; rather, the Court of Appeals chose to emphasize its own role in the "policing of prison policy." Pet. App. 9a. Nor did the Court of Appeals in fact extend such deference: to the contrary, the Court of Appeals demanded that prison officials prove that the restrictions involved in this case were narrowly tailored to respond to specific problems, and demanded that they support their informed judgment with empirical data. *E.g.*, Pet. App. 12a, 14a, 15a. In this respect, the Court of Appeals' approach is remarkably similar to that of the Sixth Circuit in *Overton*, and to its own earlier approach in *O'Lone* — both of which this Court rejected. [16]

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[16] In *Overton*, the Sixth Circuit criticized the State for not offering "data or expert testimony," but only "anecdotal evidence" and the "vast experience" of its prison officials, to support its visitation restrictions. *See Bazzetta v. McGinnis*, 286 F.2d 311, 319, 322 (6th Cir. 2002). In *O'Lone*, the Third Circuit thought that prison officials should be required to "produce convincing evidence that they are unable to satisfy their institutional goals in any way that does not infringe inmates' free exercise rights." *See Shabazz v. O'Lone*, 782 F.2d 416, 419 (1986).

The panel majority thus grossly misapplied the *Turner* factors, disregarded the principle of deference on which they rest, completely ignored *Overton*, and assigned no significance whatsoever to the context in which this case arises: the LTSU, which houses the most incorrigible prisoners in the Pennsylvania prison system, whose dangerous and disruptive behavioral histories necessitate their confinement at the highest level of security until their behavior improves. Contrary to the Court's direction in *Turner*, *Overton* and numerous other decisions, the panel majority subjected the challenged policy to an exacting and hostile scrutiny, imposing on prison officials, rather than the prisoners, the burden of proving that the policy is valid - a burden that, according to the panel majority, could be met only by empirical proof that the policy could achieve its goal of rehabilitation and was narrowly tailored to respond to specific, demonstrated security risks.

This exacting and hostile scrutiny is completely at odds with this Court's settled approach to these issues. We turn then to the proper application of the governing principles to this case.

II. The Restrictions Which Pennsylvania Imposes On The Most Recalcitrant Prisoners In Its System Are Reasonably Related To The Legitimate Penological Objectives Of Rehabilitation And Security.

A. The restrictions on access to periodicals and photographs are rationally connected to improving the behavior of the most difficult and dangerous prisoners, and to enhancing prison security.

The first *Turner* factor asks whether there exists a valid, rational connection between the challenged regulation and the legitimate governmental interest on which it is predicated. The restrictions on access to newspapers, magazines and photographs for Level 2 inmates are rationally connected to the legitimate goals of prisoner rehabilitation and prison security. They serve those goals, first by contributing to a program of behavior modification, presenting to Level 2 inmates the incentive of regaining access to such materials by improving their behavior, and presenting to other inmates the disincentive of losing access to such materials by engaging in serious misconduct; and second by reducing the opportunity for further misconduct by LTSU prisoners.

1. Behavior modification, of course, is a fundamental goal of incarceration itself, and of the entire function of prison administration. Prisoners are segregated from society and subjected to a rigorous regimen of behavior regulation, which includes the granting, withdrawal and restoration of privileges, programs and opportunities. All of this is directed toward the immediate goals of maintaining prison security and rehabilitating in-prison behavior, and toward the ultimate goal, sentence permitting, of rehabilitating prisoners for re-entry into society.

In a comprehensive effort to modify the behavior of prisoners who engage in serious, in-prison misconduct, Pennsylvania prison officials have instituted a system of progressively restrictive confinement and progressively restrictive privileges and opportunities, which, for the most dangerous and disruptive prisoners, culminates in Level 2 of the LTSU. The rationality of restricting access to periodicals and photographs in LTSU Level 2 must be viewed in this context – and, so viewed, is unassailable.

The Court in *Overton* observed unequivocally that "[w]ithdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, *especially for high-security prisoners who have few other privileges to lose.*" *Overton*, 539 U.S. at 134 (emphasis added). The parallel is obvious: LTSU Level 2 inmates are the highest-security prisoners in the Pennsylvania prison system, at the apex of a progressive discipline regime where indeed there are few privileges left to lose. Withdrawing access to periodicals and photographs for such inmates, like withdrawing access to visitors for the high-security prisoners in *Overton*, is a proper, and of course rational, technique for managing their behavior.

Yet the panel majority ignored both *Overton* and the high-security context from which both *Overton* and this case arise, occupying itself instead with its various concerns that assignment of a prisoner to the LTSU is not the product of a particular adjudication for a particular violation of prison rules, that a prisoner's term in the LTSU is indefinite, that the petitioner ostensibly offered no evidence that the restrictions achieve or could achieve rehabilitation, and that the district court failed to consider whether petitioner's "deprivation theory of behavior modification had any basis in real human psychology, or had proven effective with LTSU inmates." Pet. App. pp. 11a-13a. In its musings and conjectures, the panel majority strayed far

from the proper *Turner* analysis, which asks not whether there is empirical evidence that the regulation serves its stated goal, but rather whether there exists a "logical connection between the regulation and the asserted goal." *Turner*, 48 U.S. at 89.

That assignment to the LTSU is usually the product of cumulative serious misconducts - most if not all of which undoubtedly resulted in adjudicated violations - as opposed to a particular adjudicated misconduct, has no bearing on whether the challenged restrictions are "logically connected" to the goal of rehabilitation. The same is true with respect to the indefinite term of a prisoner's confinement in the LTSU, which is reviewed every thirty days after a mandatory initial term of ninety days. The two-year ban on visitation privileges in *Overton* was similarly indefinite in that reinstatement at the end of two years was discretionary. The Court agreed that "the restriction is severe," *Overton*, 539 U.S. at 134, but did not see that as undermining the regulation's rationality.

Nor is it even accurate that the petitioner offered no evidence that the challenged restrictions achieve or could achieve the goal of rehabilitation. In the first two years of the LTSU's operation, numerous prisoners progressed from Level 2 to Level 1 and graduated from the LTSU altogether. While no amount of proof could isolate the contribution of the challenged restrictions to that outcome, it is a fair inference that the desire of Level 2 inmates to free themselves of the restrictions indeed contributed to their improved behavior.

Finally, the panel majority's skepticism about the efficacy of granting and withdrawing privileges as a means of encouraging desired behavior — what it called a "deprivation theory of behavior modification" — is itself difficult to credit. In *Overton*, the Court had no difficulty recognizing a similar regime as "a proper and even necessary management technique to induce

compliance with the rules of inmate behavior." This "deprivation theory of behavior modification" informs a vast array of policies both within prisons and – as any parent who has ever "grounded" a teenager can attest – outside them as well; indeed, as we discussed above, the very idea of incarceration is grounded in such ideas. If prison officials must prove the validity of such theories, then the core tenet of *Turner* that courts should defer to the professional judgment of prison officials is meaningless. *Overton*, of course, counsels otherwise, as the Court rejected the similarly misguided approach of the lower court in that case.

2. The logical connection between the restrictions on access to periodicals and photographs, as instruments of behavior modification for inmates in the highest security setting in the Pennsylvania prison system, and the interrelated goals of prisoner rehabilitation and prison security is itself sufficient to satisfy the first *Turner* factor. The challenged restrictions, however, serve the goal of prison security even beyond their role in behavior modification, by reducing the opportunity to hide contraband and by withdrawing material that can be fashioned into crude tools and weapons or used to start cell fires.

Here again the panel majority indulged in exacting scrutiny, decrying the absence of proof that periodicals and photographs had actually been used in the ways suggested, that the restrictions had reduced the frequency of fires, or that "any LTSU inmates were transferred there because they had created a security risk with periodicals or photographs." Pet. App. pp. 14a-15a. Because LTSU inmates are permitted to have other material in the cells that they could misuse, the panel majority thought that "the relationship between the policy and the penological interest [in security] may be too attenuated to be reasonable." Pet. App. p. 17a.

But *Turner* does not require that prison officials wait for a specific security problem to arise, that they limit their response to a narrowly drawn and empirically tested policy, or that they forego a response that diminishes but does not eliminate a security risk. *Turner* itself involved a ban on inmate-to-inmate correspondence, which prison officials justified on the ground that such correspondence can be used to arrange escapes, assaults and other acts of violence. *Id.*, at 92. The Court found no need to determine "whether there was sufficient proof that inmate correspondence had actually led to an escape plot, uprising or gang violence," but asked only whether there was a "*logical* connection between the security concerns ... and the ban." *Id.*, at 93 n* (emphasis in original).

Turner thus requires that the courts allow prison officials "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Turner*, 482 U.S. at 89. More exacting review, the Court admonished, would "distort the decision-making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Id.*

B. Prisoners subject to these restrictions retain ample alternative means of receiving information and communications from the outside world.

The second *Turner* factor asks whether there are alternative means of exercising the right that remain available to the affected inmates. Addressing this factor, the Court of Appeals defined the right in question here very narrowly as "the right of access to a reasonable amount of newspapers, magazines and photographs." Pet. App. p.20a. The Court's decisions applying *Turner*, however, have stressed that "the right in question must be viewed reasonably and expansively." *Thornburgh v. Abbott*, 490 U.S. at 417.

Turner itself set the tone. Analyzing a regulation that restricted correspondence between inmates, the Court did not "look to see whether prisoners had other means of communicating with each other, but instead examined whether the inmates were deprived of 'all means of expression.'" *O'Lone v. Shabazz*, 482 U.S. 342, 352 (1987), *quoting Turner*, 482 U.S. at 92. Analyzing policies that prevented Muslim inmates from attending Jumu'ah service, the Court in *O'Lone* examined whether such inmates "retain the ability to participate in other Muslim religious ceremonies." *Id.* Analyzing the withdrawal of visitation privileges in *Overton*, the Court examined whether inmates "have alternative means of associating with those prohibited from visiting." *Overton*, 539 U.S. at 135. Noting that "inmates may communicate with persons outside the prison by letter and telephone," the Court emphasized that "[a]lternatives to visitation need not be ideal...; they need only be available."

Here, the right in question, "viewed reasonably and expansively," is not "the right of access to a reasonable amount of newspapers, magazines and photographs," but rather the right to receive information and

communications from the outside world. *See Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (recognizing well established First Amendment right to "receive information and ideas"). LTSU Level 2 inmates have ample alternative means of exercising that right: they are allowed monthly visits with immediate family, and unlimited visits from legal counsel; they receive daily visits form a Facility Chaplain; they may order books from the prison library; and they may send letters to and receive letters from family, friends and others, which may include newspaper or magazine articles with a personal connection to themselves. Because it defined the right so narrowly, the panel majority barely mentioned and didn't consider these alternatives. Level 2 inmates, of course, can also improve their behavior and regain the privilege of access to periodicals upon transfer to Level 1 and access to photographs upon transfer from the LTSU.

C. The right asserted cannot be accommodated without imposing substantial costs.

The third and fourth *Turner* factors ask what impact accommodation of the right would have on guards and other inmates and whether there are ready alternatives to the challenged policy. Regarding the third factor, *Turner* counsels that '[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of prison officials." *Turner*, 482 U.S. at 90. Regarding the fourth factor, *Turner* emphasizes that "[t]his is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.* At 90-91.

Accommodating the asserted right of access to periodicals and photographs would compromise the purpose of the LTSU. Again, LTSU Level 2 inmates are

the highest-security prisoners in the Pennsylvania prison system, at the apex of a progressive discipline regime where few privileges remain. Excluding those privileges from the management arsenal of prison administrators would diminish the severity of Level 2, with the "ripple effect" of diminishing its value both as a deterrent to serious misconduct by other inmates and as a means of reforming Level 2 inmates to where they can rejoin the general population as less a threat to other inmates. Accommodating the right has the additional 'ripple effect" of increasing the risk to LTSU guards and other prison staff who must enter the unit.

The panel majority suggested that the asserted right of access to periodicals could be accommodated by a guard delivering a periodical to an inmate's cell and retrieving it at the end of a specified reading period, or by a guard escorting the inmate to the mini law library - a privilege permitted already for access to legal material - to read a periodical of the inmate's choosing. Neither accommodation, however, could be implemented without the imposition of substantial costs, in the form of increased demands on personnel resources and increased security risks. Again, the majority panel ignored the context of the high-security LTSU, discounting, for example, the increased difficulty that would attend increased demand to visit the mini law library. Perversely, the majority panel went so far as to suggest that the small number of inmates in the LTSU, compared with the entire prison population, would minimize the cost of accommodation. But, though small in number, the inmates of the LTSU require greatly disproportionate expenditure of resources to ensure security.

As a means of accommodating the asserted right to view photographs, the majority panel suggested limiting "the total number of photographs that an inmate could have in his cell at one time." Pet. App. p.22a. And as a means of limiting its own suggested accommodations,

the panel majority suggested that access to periodicals and photographs could be withheld from prisoners who "pose a risk given their records or...who have abused their use of periodicals or photographs." Pet. App. pp. 22a-23a. About such intense second-guessing of prison officials, little more need be said than that the court missed for the forest for the trees - the prisoners in LTSU Level 2 universally "pose a risk given their records" – and that such fine-tailoring is way beyond the province of the courts under *Turner* and its progeny.

In summary, all four *Turner* factors support the conclusion that the challenged policy is rationally connected to the legitimate penological objectives of rehabilitation and security. Thus the policy is clearly constitutional.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case remanded with instructions to affirm the judgment of the District Court.

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No. 04-1739

IN THE

Supreme Court of the United States

JEFFREY BEARD,

Petitioner,

v.

RONALD BANKS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Whether the Pennsylvania Department of Corrections' policy of denying secular newspapers, magazines, and personal photographs to the most difficult inmates in its system in an effort to promote security and good behavior violates the First Amendment under the standard of *Turner v. Safley*.

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STATEMENT OF THE CASE

The genesis of this Section 1983 class action was the Pennsylvania Department of Corrections' seizure of a *Christian Science Monitor* newspaper mailed to inmate Ronald Banks pursuant to a subscription Mr. Banks had with the publisher. [JA 14, ¶ 11; JA 21, ¶ 11; JA 178-179; JA 50] Banks was confined at that time in the Department's Long Term Segregation Unit, a maximum security cellblock located on the grounds of the State Correctional Institution at Pittsburgh. [JA 12, ¶¶ 2; JA 21] The confiscation occurred within the framework of an administrative policy which prohibits inmates housed on Level 2 status in the Unit (as Banks was) from receiving newspapers or magazines that are not religious or legal in nature. [JA 12, ¶¶ 2; JA 21; JA 90-91]

Banks filed a civil rights complaint in the United States District Court in Pittsburgh to challenge the constitutionality of the policy after prison personnel refused to deliver his *Christian Science Monitor*. [JA 11-19] The pleading alleged that the regulation violates free speech by unreasonably denying him and other Level 2 prisoners access to periodicals addressing governmental affairs, international news, and other current event topics which pose no threat to institutional security or to any other legitimate penological interest. [See JA 14, ¶¶ 12; JA 17, ¶¶ 22] It also asserted that the policy's prohibition against the receipt by Level 2 inmates of photographs of spouses, children, and other loved ones offends the First Amendment. [JA 17, ¶¶ 23] Banks asked on his own behalf and on behalf of all other Level 2 prisoners that the regulation be declared unconstitutional and enjoined. [JA 18]

The Department of Corrections viewed access to newspapers, magazines, and personal photographs as "privileges" when issuing the challenged policy soon after the Long Term

Segregation Unit was established in April of 2000.[1] [JA 75; JA 90; JA 48; JA 131; JA 189; JA 191] Guided by this perspective, the Department has systematically prevented Level 2 inmates from receiving what it characterizes as "common, secular newspapers or magazines" and from having photographs in their cells for as long as they remain in the Unit.[2] [JA 26, ¶ 3; JA 13-14, ¶ 10; JA 21; A15, ¶ 18; JA 22; JA 48]

There are no secular newspapers or magazines available on the Unit for Level 2 inmates nor do they have access to these materials from the main prison library. [JA 155; JA 26, ¶ 5; JA 52-64] Level 2 inmates are prohibited from receiving even individual clippings through the mail from secular newspapers or magazines unless an article has a direct nexus to them, such as a relative's obituary. [JA 154-155; JA172; JA 26, ¶ 5] The Department encourages inmates to cancel their subscriptions to secular periodicals upon their admission to the Unit. [JA 158] All newspapers or magazines received by an inmate prior to admission to the LTSU are stored, sent out of the institution, or destroyed. [JA 159] Prison personnel intercept and confiscate prohibited materials mailed to Level 2 prisoners. [JA 158-159] Banned items found in a Level 2 inmate's possession are treated as contraband, exposing the prisoner to discipline. [JA 156-157; JA 176]

Publications deemed to be religious in nature are exempted from the challenged regulation. [JA 12, ¶ 2; JA 21] The

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[1] These privileges are equated by the Department to shower shoes, access to the prison commissary, and the opportunity to work without pay as a Unit janitor. [See JA 48]

[2] These items are banned only in the Long Term Segregation Unit. As a matter of Department policy, every other housing category (including inmates on Death Row as well as disciplinary and administrative confinement) are permitted to receive varying amounts of secular periodicals and personal photographs. [JA 15, ¶ 15; JA 22; JA 15, ¶ 19; JA 22; JA 27 ¶ 8, JA 102; JA 173-174; JA 141-143; JA 149-152; JA 113; JA 159-160]

exemption is broader than a Bible, Koran or other books of scripture and encompasses newspapers and magazines. [JA 179-180] Under this standard, the *Jewish Daily Forward*, *The Watchtower*, *The Christian Science Monitor Magazine*, and other such "religious" periodicals may be received.[3] *Banks v. Beard*, 399 F.3d 134, 147 (3 Cir. 2005) *The Procedures Manual* governing the Long Term Segregation Unit defines "*approved*" religious materials as "*any written documents that are reasonably related to religion.*" [JA 77; JA 101] There is a protocol in place to resolve doubts as to whether a particular newspaper or magazine is religious. [JA 178-179; JA 50] The publication is sent to the prison Chaplain for review and it will be delivered to the inmate if he decides that it is religious. [JA 178-179] Likewise, periodicals deemed by prison officials to be "legal mail" are exempt from the ban. [See JA 49] By virtue of these exemptions, a Level 2 prisoner is permitted to have as many religious or law related periodicals in his cell that will fit in a standard records box. [JA 101; JA 35] There are no exceptions to the photograph ban; even a single photograph is prohibited. [See JA 26, ¶ 3; JA 15, ¶ 18; JA 22, ¶ 18; JA 48]

The ban on secular publications and personal photographs often persists for many months, even years; and applies to a substantial majority of the Unit's occupants at any given time. [JA 26, ¶ 3; JA 13, ¶ 7; JA 21, ¶ 7; JA 127-131] Inmates are confined on Level 2 for a minimum of three months. [JA 26; ¶ 3; JA 32] However, inmates can remain on that status much longer since an inmate's retention is open-ended, unlimited in duration, and determined by criteria that are vague and subjective.[4] [See JA 13, ¶ 7; JA 21, ¶ 7; JA 131-132; JA 26,

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[3] At the time Ronald Banks' *Christian Science Monitor* newspaper was seized, a *Christian Science Monitor Magazine* was delivered. [JA 179]

[4] Among the factors that determine how long an inmate will remain on Level 2 are the "amount of time" an inmate has been on the level, the "sanitation" of the inmate's cell, his "personal hygiene and grooming," his

¶ 3; JA 40] At the close of discovery, some prisoners had been on Level 2 since the Unit's inception—a period of more than two years. [JA 131-132] The Department *Procedures Manual* recognizes that inmates admitted to the Unit "demonstrated an inability or unwillingness" to conform to Department requirements. [JA 80] As such, there are some Unit prisoners who are unable to conform their behavior and, in the Department's words, will "never succeed in transcending the strictures of that status." [JA 26, ¶ 3; JA 31] On the day of the LTSU administrator's deposition, 36 of the 39 prisoners in the LTSU were on Level 2. [JA 130] The number of Level 1 inmates is "generally in the single digits . . ." [JA 130-131]

The challenged policy precludes Level 2 prisoners from reading any news accounts, analyses, editorials, investigative reports, feature stories, and other elements of general circulation journalism related to political, cultural, and other developments unfolding in the world beyond the Unit's walls, or from seeing the photographic images of their family and friends. [See JA 26; ¶¶ 3 and 4; JA 13, ¶ 10; JA 21, ¶ 10] This comprehensive suppression of knowledge occurs in an environment where Level 2 inmates have no meaningful opportunity to acquire information about political, scientific, or cultural events occurring in society at large and only rare opportunities to see the actual faces of loved ones. The Long Term Segregation Unit is essentially a prison within a prison; a cellblock in which inmates are "consigned to an existence of rigid isolation and enforced idleness for periods of many months and even years." [JA 13, ¶ 9; JA 21] There are no

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"interaction" with other inmates, his "demeanor" with the Unit staff, and his "involvement" in self-improvement activities. [JA 40; JA 89] As noted later, Level 2 prisoners have little opportunity to interact with other inmates and there is no indication in the *LTSU Rules and Regulations* or other Unit-related documents that they are offered any self improvement programs. [See JA 29-47; JA 65-101]

radios or televisions in the Unit. [JA 102] The only published materials Level 2 inmates are permitted to read, other than religious or legal publications, are paperback "leisure" books ordered from the prison library which consist largely of fantasy and romance novels, westerns, science fiction, and other forms of literature that do not focus on current events. [JA 39; JA 56] Social visits are limited to one hour a month with immediate family members, if an inmate has immediate family members who are willing and able to visit him. [JA 34; JA 98] No weekend or holiday visits are permitted. [JA 34; JA 98] Social telephone calls to persons outside the prison are barred. [JA 48] Level 2 prisoners are isolated in one-person cells twenty-three hours a day and "rarely able to speak or socialize directly" with each other. [JA 13, ¶ 9; JA 21, ¶ 9] Their ability to communicate with other Unit inmates is limited by a rule that prohibits "[l]oud talking or yelling from cell to cell." [JA 45, ¶ 6] Interaction with fellow prisoners is further constricted by a policy that permits only one inmate at a time to be outside a cell, under escort of two guards and in hand and leg irons. [JA 28, ¶ 12] Even when allowed to leave their cells for outdoor recreation, they do so "individually" in small "cages." [JA 13, ¶ 9; JA 21, ¶ 9; JA 37]

Level 2 inmates are permitted to receive mail. [JA 36] Under Department policy, the processing of incoming mail includes periodicals and photographs. [JA 115-117; JA 149] Mail is inspected for contraband in the prison mailroom prior to being delivered to the Unit. [JA 36] Incoming mail is delivered to the LTSU every day the mailroom is in operation and distributed to LTSU inmates by Unit officers. [JA 36] Officers collect outgoing mail-when they pick up the inmate's morning food trays. [JA 36]

Deputy Superintendent Joel Dickson, the Department's designated deposition witness and administrator of the Unit, testified that petitioner's ban on secular periodicals and personal photographs is premised on two penological objectives:

security and rehabilitation. [JA 188-189] According to Mr. Dickson, denying Level 2 prisoners access to general circulation publications and photographs is designed to make it more difficult for inmates to hide contraband in their cells; reduce the possibility that they will start cell fires; and decrease the potential for them to fashion paper weapons or implements with which to hurl waste and other projectiles from cells. [JA 189] Mr. Dickson did not contend that the ban on secular periodicals and photographs was enacted in response to any historical abuse of these materials by Level 2 prisoners. [See JA 118-200] He stated that precluding inmates from having secular periodicals and photographs might encourage them to modify their behavior and, thus, lead to their rehabilitation. [JA 189]

There is an abundance of *authorized* items in the cells of Level 2 inmates that can readily be used for the illicit purposes Deputy Dickson cited. In addition to a boxful of religious or law related newspapers and magazines, they are permitted to have two paperback library books; a writing tablet; ten envelopes; a cluster of personal letters; a pillow case; two bed sheets; a blanket; a laundry bag; a towel; a washcloth; a jumpsuit; several sets of undershirts, underpants, and socks; a roll of toilet paper; a drinking cup; a plastic food tray; and a spoon, in their cells. [JA 34-35; JA 38-39; JA 194-198] Even without secular periodicals and photographs, Mr. Dickson acknowledged that contraband can readily be hidden, fires can be started, paper weapons can be fashioned, and items can be thrown from the cells.[5] [JA 195-198]

LTSU policy requires that all cells "be subjected to a security inspection" at least three times a week and "thoroughly searched" at least once a week, and that inmates

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[5] There are only a few inmates who throw items from their cells. [JA 194] Those who do, use the authorized cups, pieces of paper, and other things in the cells for that purpose. [JA 194]

"change cells monthly." [JA 42] The policy also prohibits inmates from having any "flame producing materials" in their cells, including matches. [JA 39; JA 195] The LTSU cells are fronted by metal doors with a food slot (i.e., a "pie hole") through which meals and other items can be passed. [JA 199; JA 46, ¶ 10; JA 81] Under Department policy, the cell fronts are required to have "appropriate devices to prevent inmates from throwing items at staff (i.e. screening, door shields, etc.)." [JA 81]

While Deputy Dickson stated that LTSU inmates are not "totally predictable", he conceded that Unit personnel "fairly well know" which inmates "are prone to use their personal property in a violent sort of way . . ." [JA 197] As a matter of policy, an inmate's property is subject to confiscation if he uses or alters it in a way "that it is considered a threat to the safety and security of the institution. . . " [JA 34] Furthermore, an inmate's privileges may be suspended or taken away if his "behavior is deemed to warrant such loss." [JA 33] The Unit Team has "total authority regarding what privileges and for what period the privileges shall be forfeited" and any action in that regard is "administrative in nature." [JA 33-34]

When testifying about the behavior modification rationale, Deputy Dickson theorized that depriving inmates of secular newspapers, magazines, and personal photographs might encourage the prisoners to conform their behavior to Unit rules. [JA 189] Consistent with the Department's view that "being able to read a newspaper or a magazine . . . should be an earned privilege," he stated that Level 2 inmates must "earn" access to these items by "graduating" to Level 1. [JA 191] He asserted that the prohibitions are a way of inducing compliance with institutional rules—enabling an inmate either to become a "more productive citizen" (if released from incarceration) or to be integrated into the system's general population cellblocks (if not released). [JA 189] According to

Dickson, the Department is "very limited... in what [it] can and cannot deny or give an inmate" and secular periodicals and personal photographs "are some of the items that we feel are legitimate as incentives for human growth." [JA 190] Although the Department utilizes behavior modification counseling with Level 1 prisoners in the areas of "substance abuse; anger/violence management; life skills . . . and effective emotional expression," as ways of producing "human growth," these rehabilitative programs are not offered to Level 2 prisoners. [See JA 43] Instead, the Department relies exclusively on its deprivation theory to induce change.

The Long Term Segregation Unit was established primarily as a repository for prisoners expelled from the Special Management Units for failure to modify their behavior. [See JA136-137; JA 66-67, ¶¶ C and F] In a "minority of cases", inmates come from non-SMU housing areas. [JA 137] The Special Management Units are behavior modification cell blocks for "inmates who are, or have been, disruptive or violent." [JA 136, JA 68] They are "specifically designed to provide each inmate with the opportunity to demonstrate a stable level of behavior so they can be safely returned to general population or another suitable status." [JA 80] Most of the LTSU inmates are "people who have flunked out of or failed" in the Special Management Units. [JA 137] While in the SMUs, these prisoners were given a much broader spectrum of incentives to induce behavioral change than what is offered in the LTSU. Those inducements included: the opportunity to earn access to radios and televisions; up to ten magazines; bi-weekly social telephone calls; weekly visits with both friends and family members; weekly use of the prison commissary for purchases of up to twenty dollars; the ability to associate outside their cells with small groups of fellow prisoners; group recreational yard activities; educational classes and supervised study programs; the opportunity to leave their cells unshackled; and, if warranted, a probationary period in the general prison population. [JA 91-

102] Behavior modification failed for these men despite these incentives. [See JA 136-137]

Virtually all of the SMU incentives are eliminated or substantially diluted the instant an inmate enters the LTSU. [See JA 48] What remains (either in whole or in reduced form) is the ability to earn access to a secular newspaper; five magazines; one social telephone call per month; two social visits per month; use of the prison commissary for purchases of up to five dollars per week; and in-cell GED or special education study, if approved. [JA 102] During the first two-and-a-half years of the LTSU's operation, only ten inmates "graduated" from the Unit. [JA 138] Another two were released because their criminal sentences expired.[6] [JA 138]

SUMMARY OF THE ARGUMENT

1. Outside the prison walls, the free speech component of the First Amendment protects the right to "suitable access to social, political, aesthetic, moral, and other ideas and experiences." The acquisition of information includes the right to read what is printed in newspapers and magazines. Free speech, however, is not limited to printed words in periodicals; it also encompasses photographs.

2. A convicted inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with legitimate penological interests. Because the right to receive information in a prison setting is not inherently inconsistent with imprisonment itself or the objectives of imprisonment, it is not extinguished as an inmate passes through the prison gates.

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[6] Left to debate in another forum is the specter of incorrigibles being released to society who have been kept ignorant of political, social, and other developments during the period of their segregation.

3. A prison policy impinging upon an inmate's free speech rights is valid only if it is "reasonably related" to a legitimate penological interest.

4. The four-part standard established in *Turner v. Safley* to determine whether an administrative regulation is reasonably related to a legitimate penological interest is rooted in two fundamental principles: First, when considering a constitutional challenge to a prison policy, a court owes substantial deference to prison officials; and second, it must also "take cognizance" of valid claims asserted by inmates.

5. Neither judicial deference nor restraint will save the regulation if a court concludes that a policy either lacks a "rational connection" to legitimate a penological interest or is an "exaggerated response" to such an interest.

6. Level 2 inmates have shown that the challenged policy does not satisfy *Turner's* threshold requirement that a regulation impinging on a prisoner's constitutional right bear a rational connection to a legitimate penological interest. The ban on secular periodicals and personal photographs is arbitrary within the meaning of *Turner* because any connection the policy may have to the Department's asserted security and rehabilitative objectives is too attenuated to be rational. Among other things, the Department could not reasonably have thought when adopting the policy that it would advance security, since many of the items Level 2 inmates are allowed to have in their cells (including a boxful of religious or law-related periodicals) can be used for the illicit purposes cited by the Department as justifications for the policy. Likewise, in light of the incorrigible histories of the prisoners the Long Term Segregation Unit was designed to hold, the Department could not reasonably have thought the behavior of Level 2 inmates might be modified by the withholding of the First Amendment materials.

7. Because Level 2 inmates are isolated in an environment in which they have only the most minimal contact with the outside world, they do not have suitable alternate means of exercising their right to receive information about current political or other developments unfolding in society at large. The Department's contention that the inmates can receive such information through letters or visits is belied by the record and common sense. Petitioner's position also vastly understates the nature of the right at stake and the breadth of the knowledge that its policy suppresses.

8. Accommodation of the inmates' rights can be achieved without adverse impact on LTSU security or on the prison as a whole. The record confirms that permitting them to have some quantum of newspapers, magazines, and personal photographs in their cells is unlikely to have any negative "ripple" effect on inmates or guards in the Unit or on the institution. The Department already engages in routine screening and censorship of mail, and the addition of the banned items for fewer than forty men will not appreciably add to any administrative or other burden. Lifting the ban may, in fact, diminish the burden by eliminating the need to ascertain whether a publication is religious, law-related, or secular.

9. Finally, an alternative exists to a total ban on secular periodicals and photographs. These items can be delivered to the inmates' cells with their regular mail, kept for a specified "reading period", and returned when food trays are retrieved after meals.

ARGUMENT

1. The Challenged Policy Infringes Upon Core Inmate Free Speech Rights

The parameters of free speech outside the prison walls are well charted. In society at large, "[t]he use of the mails is almost as much a part of free speech as the right to use our

tongues. . ." *Blount v. Rizzi*, 400 U.S. 410, 416 (1971). Freedom of speech extends both to the speaker and a willing listener. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-757 (1976). As such, the protection of free speech on matters of public interest goes beyond the desire to foster self-expression and includes affording the public access to the dissemination of information and ideas. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (19878). "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them." *LaMont v. Postmaster General of United States*, 381 U.S. 301, 308 (1965) (Brennan concurring).

The First Amendment's free speech component is broad in scope. It protects the right to "suitable access to social, political, aesthetic, moral, and other ideas and experiences . . ." *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972). It encompasses the right to "acquire information about . . . common interests." *Grosjean v. American Press Co.*, 297 U.S. 233, 243 (1936). In conjunction with the acquisition of information, it includes a "right to read." *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965). The First Amendment also prohibits the government from "limiting the stock of information from which members of the public may draw," *Virginia State Board of Pharm. v. Virginia City Consumer Council*, 425 U.S. 748, 783 (1976) and from needlessly burdening the "public's right to hear and read" what others write and say. *U.S. v. National Treasury Employees Union*, 513 U.S. 454, 470 (1995). Consistent with the spirit of the First Amendment, the State may not unduly "contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. at 481.

"[E]xpression on public issues has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP* v. *Claiborne Hardware*, 458 U.S. 886, 913 (1982).

The First Amendment "favors dissemination of information and opinion" and the guarantee of free speech was designed to prevent any action by the government which might unduly prevent "free and general discussion of public matters . . ." *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975). The Constitution contemplates that the press, which includes newspapers and magazines, will "play an important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966). Freedom of speech, however, is not limited to printed words appearing in periodicals: it encompasses photographs as well. See *Kaplan v. California*, 413 U.S. 115, 119-120 (1973).

Prisons are not immune from the sweep of the First Amendment. See *Cruz v. Beto*, 405 U.S. 319, 322 (1972). A convicted inmate "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with legitimate penological objectives of the prison system." *Pell v. Procunier*, 417 U.S. 817, 822 (1972). One of the First Amendment rights that survive incarceration is freedom of speech. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). Inmates are not stripped of free speech protection as they pass through the prison gates, although the exercise of this right is less extensive in a prison context. See *Jones v. North Carolina Prisoners Union*, 433 U.S. 119, 125 (1977). More to the point, lower federal courts, following *Pell's* "inconsistency principle", have long recognized that the right to receive information and ideas is not inherently inconsistent with imprisonment itself or the objectives of imprisonment.[7] See *Crofton v. Roe*, 170 F.3d

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[7] In their concurring opinion in *Procunier v. Martinez*, 416 U.S. 396 (1974), Justices Marshall and Brennan underscored the importance of an inmate's access to information in a prison setting. They wrote: "When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment...It is the role of the First

957, 959 (9 Cir. 1999); *Carpenter v. State of S.D.*, 536 F.2d 759, 761 (8 Cr. 1976); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1030, 1036 (2 Cir. 1985); *Sizemore v. Williford*, 829 F.2d 608, 610 (7 Cir. 1987); *Laaman v. Hancock*, 351 F.Supp 1265, 1267 (D.N.H. 1972); *Battle v. Anderson*, 376 F.Supp. 402, 426 (E.D.Okla. 1974); *Jackson v. Elrod*, 671 F.Supp. 1508, 1511 (N.D. Ill. 1987). Courts have concluded that the right to receive information in a prison setting encompasses newspapers and other such conduits.[8] See *Aikens v. Jenkins*, 534 F.2d 751, 755 (7 Cir. 1976); *Sizemore v. Williford*, 829 F.2d 608, 609-610 (7 Cir. 1987); *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9 Cir. 2001); *Abdul Wali v. Coughlin*, 754 F.2d at 1033-1034; *Allen v. Coughlin*, 64 F.3d 77, 80 (2 Cir. 1995); *Van Cleave v. U.S.*, 854 F.2d 82, 84 (5 Cir. 1988); *Cooper v. Schriro*, 189 F.3d 781, 784 (8 Cir. 1999). They have also recognized that photographs enjoy First Amendment protection in a prison context. See *Davis v. Norris*, 249 F.3d 800, 801 (8 Cir. 2001); *Peperling v. Crist*, 678 F.2d 787, 790 (9 Cir. 1982); *Trapnell v. Riggsby*, 622 F.2d 290, 292-93 (7 Cir. 1980); *Balance v. Virginia*, 130 F.Supp. 2d 754, 758-59 (W.D. Va. 2000).

It is settled that prison officials may constitutionally limit, for security reasons, the *volume* of free speech material that may be sent to an inmate or stored in a cell. See *Sheets v. Moore*, 97 F.3d 164, 168 (6 Cir. 1996); *Lindell v. Frank*, 377 F.3d 655, 659 (7 Cir. 2004). Prison officials may also impose appropriate restrictions on the *source*, *nature*, and *content* of such materials for security and other legitimate penological reasons without crossing the constitutional line. See *Bell v. Wolfish*, 441 U.S. at 549-551 (upholding a policy requiring

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Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearning of the human spirit." *Id.* at 428.

[8] The Department does not dispute that access to information and ideas is a right that continues in a prison setting. Nor does it dispute that photographs enjoy constitutional protection in a penitentiary context.

hardback books to be sent directly from the publisher or bookstores due to fact that hardback books are serviceable for smuggling contraband into an institution); *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (upholding on security grounds a regulation authorizing federal wardens to reject publications whose content would be detrimental to the security, good order, or discipline of the prison, or might facilitate criminal activity); *Waterman v. Farmer*, 183 F.3d 208, 209 (3 Cir. 1999) (allowing on rehabilitation grounds a ban on the receipt of sexually oriented materials by sex offenders); *Trapnell*, 622 F.2d at 293 (sustaining a ban on the receipt of sexually explicit photographs of an inmate's spouse). Whether the categorical ban in this case comports with the strictures of the First Amendment requires an examination of the record under the illumination of legal principles set out in *Turner v. Safley* and related Supreme Court decisions.

2. The Constitutionality of the Challenged Policy Must be Examined Within *Turner's* Analytical Framework Because the First Amendment Rights of Level 2 Inmates are Implicated

The analytical framework for determining the constitutionality of a prison policy impinging on an inmate's free speech rights is the four-prong reasonableness standard announced in *Turner v. Safley*, 482 U.S. 78 (1987). Under *Turner*, a regulation affecting the receipt of written publications and other First Amendment materials by prisoners is valid only if it is "reasonably related to legitimate penological interests." *Thornburgh v. Abbott*, 490 U.S. at 413. This multi-faceted test requires a court to ascertain whether there is a "valid, rational connection" between the challenged policy and the "legitimate and neutral" governmental interests said to justify it; whether the inmates have the ability to exercise the circumscribed right apart form the means prohibited by the policy; the costs that accommodating the right would have on other prison guards, fellow inmates and

prison resources; and whether there are alternatives to the policy that would fully accommodate the inmate's rights at little or no cost to valid penological interests. *Turner*, 482 U.S. at 89-91.

This is not a "toothless" standard that is inattentive to the rights of prisoners. See *Thornburgh*, 490 U.S. at 414-415. It is rooted in the principles that, when considering a constitutional challenge to a prison policy a court must not only defer to prison officials and exercise judicial restraint, but also "take cognizance" of valid claims asserted by inmates. See *Turner*, 482 U.S. at 84. Neither deference nor restraint will save a regulation if a court concludes that a policy lacks a "rational connection" to legitimate penological interests. See *Turner*, 482 U.S. at 89. The same is true if it finds that a policy represents an "exaggerated response" to such interests. See *Turner*, 482 U.S. at 97-99.

A. The Policy of Denying Secular Newspapers, Magazines, and Photographs to Level 2 Inmates is not Rationally Related to the Department's Stated Objectives [Factor One]

Under the first *Turner* factor, a prison policy "cannot be sustained where the logical connection between the regulation and the asserted [penological] goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. "If the connection between the regulation and the asserted goal is 'arbitrary or irrational,' then the regulation fails, irrespective of whether the other [*Turner*] factors tilt in its favor." *Shaw v. Murphy*, 532 U.S. 223, 229-230 (2001). When examining the nexus, a court must determine whether prison administrators "*might reasonably have thought* the policy would advance its interests." *Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 1150 (2005) (citation omitted) (emphasis added). In that regard, a court may call upon "common sense" to aid the inquiry. *See Turner*, 482 U.S. at

98. There are instances where a logical connection between a policy and a stated penological objective is "self-evident." See *Overton v. Bazzetta*, 539 U.S. 126, 133 (2003) (where a regulation prohibiting visitation by former inmates was found to bear a "self-evident connection" to interests in maintaining prison security and preventing future crimes). There are also occasions when it is obvious that there is no logical connection between a regulation and an asserted objective. See *Turner*, 482 U.S. at 98 (where "common sense" suggested that there was no logical connection between the challenged marriage restrictions and the formation of love triangles). If the existence or absence of a logical connection is not self evident, a court should examine the evidence to determine whether prison officials might reasonably have thought, when adopting the policy, that it would "advance" or "promote" the underlying objectives.[9] See *Overton*, 539 U.S. at 133; *O'Lone v. Shabazz*, 482 U.S. 342,351-52 (1987).

In *Overton*, this Court, when concluding that a prison visitation regulation restricting visitation by children bore a rational relationship to maintaining internal security and protecting child visitors, wrote: "The regulations *promote* internal security, perhaps the most legitimate of penological goals . . . by reducing the total number of visitors and limiting the disruption caused by children in particular. Protecting children from harm is also a legitimate goal. . . The logical

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[9] The *amicus* brief submitted by the Council of State Governments mistakenly suggests that the "rational connection" factor is merely a traditional rational basis review in which "[t]he burden is on the one attacking the [rule] to *negative every conceivable basis which might support it whether or not the basis has a foundation in the record.*" See Brief at p. 9 (citations and internal quotations omitted)(emphasis added.). In truth, *Turner* requires prison officials to "put forward" the legitimate governmental interests upon which the policy is predicated and it is those objectives that are the focus of Turner's first and three remaining factors. It is not the inmate's burden to negate "every conceivable basis" which might support a challenged policy.

connection between this interest and the regulations is *demonstrated by the trial testimony* that reducing the number of children allows guards to supervise them better and to ensure their safety. . ." *Overton*, 539 U.S. at 133 (emphasis added). In a similar vein, in *O'Lone* this Court examined the factual record before concluding that the goals cited by prison officials for a policy prohibiting inmates from returning to the institution during the day (and thus, precluding Muslim inmates from attending a daily religious service) "were *advanced*." 482 U.S. at 351 (emphasis added). Chief Justice Rehnquist wrote:

> "The subsequent policy prohibiting returns to the institution during the day also passes muster under [the logical connection] standard. Prison officials testified that the returns from outside work details generated congestion and delays at the main gate, a high risk area in any event. Return requests also placed pressure on guards supervising outside details, who previously were required to 'evaluate each reason possibly justifying a return to the facilities and either accept or reject that reason.' Rehabilitative concerns further supported the policy; corrections officials sought a simulation of working conditions and responsibilities in society. Chief Deputy Ucci testified: 'One of the things that society demands or expects is that when you have a job, you show up on time, you put in your eight hours, or whatever hours you are supposed to put in, and you don't get off...If we can show inmates that they're supposed to show up for work and work a full day, then when they get out at least we've done something.' These legitimate goals *were advanced* by the prohibition on returns; it cannot seriously be maintained that 'the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.'"

O'Lone, 482 U.S. at 351 (citations omitted) (emphasis added).

(i) *The Department's Policy is Not Rationally Related to Security*

The existence of a logical relationship between the challenged policy and the Department's security rationale is not self-evident. Moreover, the evidence shows that prison officials could not *reasonably* have thought that Unit security would be advanced to any appreciable degree by an absolute ban of secular periodicals and photographs.[10] It is obvious that the presence of the prohibited materials will not increase the security risk given the nature and amount of *authorized* items in the cells which can fuel cell fires, hide contraband, or be used for the other illicit activities identified by Mr. Dickson. It had to be obvious to Department officials when designing the policy, that without the banned materials, Level 2 inmates could readily conceal contraband in the boxful of religious or law related periodicals they are allowed to have, within the pages of a Bible or paperback books, in envelopes, between bed linen, and in numerous other places where authorized property is located. Department administrators

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[10] The Department's answer to the complaint reflects that security might not have been an objective of the policy at its inception but was developed as an *ad hoc* rationale in reaction to the litigation. The complaint alleged that neither the contents of the *Christian Science Monitor* nor the paper on which the newspaper was printed posed any meaningful risk to the security of the Long Term Segregation Unit or to prison as a whole. [JA 14, ¶ 12-13] The Department replied: "*After reasonable investigation and reflection, defendant can neither admit nor deny the allegations...without an extensive review of the origins, rationale and operation of the policy in question from the standpoint of prison security and general prison administration and the safe and effective operation of the LTSU program.*" [JA 21, ¶¶ 12-13] The policy originated only sixteen months prior to the filing of the lawsuit. See [JA 1] If denying Banks and his fellow Level 2 inmates access to general circulation newspapers was an effort to reduce the potential for hiding contraband, setting cell fires, fashioning paper weapons, and hurling projectiles from cells, as the Department later claimed, why was it unable to identify these security considerations soon after promulgating the policy?

could not have been oblivious to the fact that these inmates (if so inclined) can start or fuel fires with the array of approved flammable items and fashion paper weapons or fling projectiles with the approved items in their cells. Under these circumstances, one would have to suspend common sense to conclude that the elimination of a secular newspaper, a magazine, or a few photographs from Level 2 cells might have any appreciable positive impact on LTSU security. Deference should not trump common sense or the evidence. Any connection between the policy and security is so remote as to render the regulation arbitrary and irrational.

The Court of Appeals recognized the attenuated relationship between the policy and institutional security. When examining the connection, it wrote: "[I]f the prohibition of [secular] newspapers, magazines and photographs has only a minimal effect on security in the LTSU because of the other materials that they are permitted in the cells, the relationship between the policy and the [security] interest may be too attenuated to be reasonable." *Banks v. Beard*, 399 F.3d 134, 144 (3 Cir. 2005). The Court concluded that "given the materials Level 2 inmates are permitted in their cells, prohibiting a single newspaper or magazine has no significant relationship to the stated security objectives. There are many other non-prohibited means for inmates to fuel fires, hurl waste, conceal contraband and create weapons."[11] *Id.* at 143.

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[11] In parallel cases, lower federal courts have recognized the tenuous connection between absolute prohibitions of newspapers and other such periodicals, and prison security. As observed in one case, "given the fact that inmates in administrative segregation are permitted to have mattresses, blankets, pillow cases and sheets, clothing, letters and writing materials, legal papers, Bibles, and a limited number of non-subscription magazines and books . . . the court is compelled to conclude that inmates who wish to set fires can and will do so, whether or not they have subscription publications for fuel . . . and [that] deprivation of such publications would have, if at all, *de minimis* effect on the number of fires set

(ii) *The Policy is not Rationally Related to Rehabilitation*

The Department argues that because the challenged policy is part of a system-wide effort to modify the behavior of prisoners who engage in serious misconduct—the last step in a series of "progressively restrictive confinement and progressively restrictive privileges and opportunities"—the logical relationship is "unassailable." [*Petitioner's Brief*, p. 25] This formulation is inconsistent with the rational relationship inquiry articulated by this Court. What must be determined is whether it is self-evident that *the elements of this particular set of deprivations or rewards* advances the rehabilitation of Level 2 prisoners and, if not, whether prison officials, when designing the policy, might reasonably have thought that it would advance their rehabilitation. The rationality of the challenged policy must stand or fall on its own logical connection to *the rehabilitation of the Level 2 prisoners* and is not "unassailable" merely because it is part of the Department's broader behavior modification efforts. Moreover, the existence of a rational relationship between the policy in

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in administrative segregation" or on the intensity of fires. *Spellman v. Hopper*, 95 F.Supp. at 1273-74. See also *Mann v. Smith*, 796 F.2d 79, 82 (5 Cir. 1986) (where the court stated that "because the jail has a no smoking rule for inmates and the jailers permit the inmates to have other forms of paper and similar materials, the official rationale seems tenuous at best"); *Jackson v. Elrod*, 671 F.Supp. at 1511 (where the court concluded that the possibility of hiding contraband was not a sufficiently rational reason for circumscribing the receipt of publications by inmates where there were a number of other places in cells in which to conceal contraband items); *Prison Legal News v. Lehman*, 397 f.2d at 700 ("it is irrational to prohibit prisoners form receiving bulk mail and catalogs on the theory that it reduces fire hazards because the DOC already regulates the quantity of possessions that prisoners may have in their cells"; *Morrison v. Hall*, 261 F.3d 896, 902 (9 Cir. 2001) (where prison officials already regulate the amount of possessions inmates may have in their cells, it is . . . 'irrational' to prohibit prisoners from receiving subscription for-profit mail on the theory that it reduces fire hazards").

question and the asserted rehabilitative objective cannot be established merely by incanting the proposition that there is an obvious link (in general) between behavior modification and rehabilitation.

The policy in this case bears no self-evident link to the rehabilitation of Level 2 prisoners. It is not apparent on its face or a matter of common sense that depriving the most difficult inmates in the Pennsylvania prison system of secular periodicals and photographs might cause them to change their behavior. Furthermore, the record strongly suggests that there was no reason for the Department to believe that the regulation might have any positive impact on the rehabilitation of these historically incorrigible prisoners.[12] As outlined above, most of the inmates who are transferred to the LTSU come from Special Management Units where these so called "worst of the worst" failed to alter their behavior despite a cluster of incentives to do so. When creating the Unit, the Department knew that it would be populated by inmates who are incapable or unwilling to modify their behavior no matter what the incentives. If the prospects of having radios and televisions, weekly social visits, out of cell encounters with fellow prisoners, and the other inducements previously catalogued were insufficient to catalyze change, how could Department officials have *reasonably* entertained a view that withholding a newspaper or a few photographs might succeed? Under these circumstances, the policy lacks a rational relationship to rehabilitation and, therefore, is fatally flawed.[13]

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[12] In fact, three years after the policy's implementation, the Department stated during oral argument below that it was a "hope" that the policy might some day work. *Banks*, 399 F.3d at 142.

[13] In an effort to bolster its rehabilitation and security justifications, the Department asserts for the first time in this litigation that there is a deterrent aspect to the challenged policy. In its brief to this Court, the Department argues: "The restrictions on access to newspapers, magazines and photographs for Level 2 inmates are rationally related to the legiti-

B. There are no Meaningful Alternative Avenues for Level 2 Inmates to Acquire Information Related to Current Political, Cultural and Other Such Activities or to View Images of, and Events Involving, Loved Ones [Factor Two]

This factor recognizes that the evaluation of a challenged policy "cannot be considered in isolation but must be viewed in the light of alternative means" of exercising the right at issue. See *Pell*, 417 U.S. at 823. In a free speech context, when a court "is called upon to balance First Amendment rights against [legitimate] governmental interests," the existence of alternative methods of communication are "relevant in determining the scope of the burden placed by the regulation on inmates' First Amendment rights." *Turner*, 482 U.S. at 88. While the alternatives "need not be ideal" and only have to "be available," they must, nevertheless be of "sufficient utility" to give "some support to the regulations . . ." *Overton*, 539 U.S. at 135. It is when "reasonable and effective" means of exercising the right remain open that administrators "must be accorded [particular] latitude in

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mate goals of prisoner rehabilitation and prison security [by] presenting to other inmates the disincentive of losing such materials by engaging in serious misconduct . . ." [*Petitioner's Brief*, p. 24] There is no reference in the record to this "deterrence" justification. Even the Department's *Statement of Material Facts Not in Dispute* made no mention of any goal of deterring inmates housed outside the LTSU from engaging in misconduct. [See JA 27, ¶¶ 8-10] Proffering this rationale five years after commencement of this lawsuit raises additional questions with respect to the policy's actual purpose. In *Turner*, when addressing an argument forwarded by the Missouri Division of Corrections that permitting inmate marriages might result in "love triangles" and violent confrontations between inmates, this court underscored the fact that the petitioners had "pointed to nothing in the record suggesting that the marriage regulation was viewed as preventing such entanglements" when concluding that the marriage policy was not reasonably related to security. *Turner*, 482 U.S. at 98.

drawing [the] lines" which impact the right. See *Pell*, 417 U.S. at 826. Where there are "particular qualities inherent" in the prohibited form of speech which are not present in the available avenues, "[the] existence of other alternatives [does not] extinguis[h] altogether any constitutional interest on the part of the [prisoner] in this particular form" of speech. *Pell*, 417 U.S. at 823-824, quoting *Kleindienst*, 408 U.S. at 765.

When applying *Turner*, "the right in question must be viewed reasonably and expansively." *Thornburgh*, 490 U.S. at 417. The right impinged by the periodical ban is the access of Level 2 prisoners to information and ideas from the outside world. Foreclosing them from subscribing to secular newspapers and magazines effectively eliminates all meaningful avenues through which they can acquire current information related to the spectrum of political, cultural, scientific, and other societal activities occurring in the United States and abroad. These men are among the most isolated citizens in the nation. Cutting them off from the means by which Americans routinely acquire their information (newspapers, magazines, radios, and televisions) causes an extraordinary constriction—approaching absolute—of the stock of information from which these men may draw. See *e.g. Virginia State Board of Pharm.*, 425 U.S. at 783. It is disingenuous for the Department to suggest that this *Turner* prong can be satisfied through letters, sporadic social visits, access to the prison chaplain, and the opportunity to meet with attorneys.

The time when letters served as a primary means of communicating political and other public developments expired long ago. Furthermore, it is specious for the Department to argue that the few individuals with whom Level 2 prisoners may interact can fill this void. According to the *DOC Procedure Manual*, the chaplains "are responsible for tending to each inmates' religious needs . . ." [JA 100] Their purpose is not to summarize news or other evolving develop-

ments for inmates. Likewise, if an inmate has counsel, the attorney's purpose is to discuss his legal affairs. Social visits for inmates who have family members willing and able to visit are limited to an hour a month. Against this backdrop, it is absurd to contend that letters, chaplains, attorneys or family visits can function as suitable surrogates for periodicals. None of these avenues can approximate the diversity and depth of coverage provided by newspapers and magazines. Any information conveyed through these means cannot reasonably be expected to be anything more than sporadic and superficial.

Furthermore, the fact that Level 2 prisoners are permitted to receive religious and law related publications and paperback "leisure" books does not fill the informational void. The availability of these materials merely creates the anomalous situation where an inmate can read about biblical wars and political intrigue occurring thousands of years ago, but not about the war in Iraq or lobbying practices affecting the operation of Congress; where he can learn about the plagues of ancient Egypt but not about the ravages of Hurricane Katrina; where he can plumb the depths of science fiction but not follow current scientific developments.

The scope and intent of general circulation periodicals are profoundly different than any of the available avenues through which Level 2 inmates can acquire information and ideas. The alternative avenues, to borrow from *Overton*, are not of "sufficient utility" to "give some support to the regulations. . ." See *Overton*, 539 U.S. at 135. Nor are they, in the words of *Pell*, "reasonable and effective means" of exercising the right. See *Pell*, 417 U.S. at 826. The practical implication of the Department's ban is to literally wall these inmates off from the contemporary world.

Under the Department's policy, Level 2 inmates also have no suitable alternatives to photographs. Letters and occasional visits with immediate family members cannot sub-

stitute for photographs when a parent, spouse, or child is deceased; when a relative is too ill or disabled to travel to prison; if a person is merely a friend and thus ineligible to visit; or if a picture concerns past events like an inmate's combat service, the birth of a child, a high school graduation, or a wedding. There are unique qualities inherent in photographs that are not approximated by the available avenues of contact that remain open to these prisoners.

C. Allowing Level 2 Prisoners to Receive the Banned Publications Will Have No Appreciable Negative Impact on the Long Term Segregation Unit or on the Prison Where the Unit is Located [Factor Three]

Turner's third factor assesses the "impact" that accommodating an inmate's constitutional rights will have on guards and fellow prisoners and on "the allocation of prison resources generally." *Turner*, 482 U.S. at 90. This element addresses whether an accommodation will have "adverse effects on the institution." See *O'Lone*, 482 U.S. at 352. Identifying the *nature* and *extent* of any adverse impact is important because courts must be "particularly deferential to the informed discretion of prison officials" only if the impact "will have a significant 'ripple effect' on fellow inmates or on prison staff. . ." See *Turner*, 482 U.S. at 90. Such an effect occurs when "the right can be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike," *Thornburgh*, 490 U.S. at 418, or where an accommodation "would cause a significant reallocation of the prison system's financial resources . . ." *Overton*, 539 U.S. at 126.

As discussed under Factor One, the record shows that accommodating the inmates' access to secular periodicals and photographs will have no significant negative impact on the Department's asserted penological interests. Because these inmates are in strict isolation, and already have access to

religious and legal periodicals as well as the other items catalogued above, allowing a small quantum of secular newspapers, magazines, and family photographs in individual cells is unlikely to have the "ripple effect" claimed by the Petitioner of increasing security risks to guards and prison staff.[14] Moreover, for the reasons discussed under Factor One, Level 2 inmates' access to these First Amendment materials will not adversely affect their rehabilitation.

Finally, there will be no significant impact on the allocation of prison resources. Department policy contemplates that newspapers, magazines, and photographs, like other inmate mail, will be received at the prison mailroom for screening. The addition of periodicals or photographs for the fewer than forty Level 2 inmates will not significantly burden that process. Instead, lifting the ban may, in fact, diminish the burden by eliminating the need to ascertain whether a publication is religious, law related, or secular. Department policy also contemplates that mail will be forwarded to the Unit and delivered to inmates by LTSU officers. [JA 36] The addition of a small number of periodicals or photographs would not significantly burden this process. Under existing protocol, LTSU outgoing mail is given to Unit officers when they pick up the morning food trays. Within this format, a newspaper, magazine, or photograph could easily be delivered to a Level 2 prisoner with his authorized mail and the periodicals retrieved when his food tray is picked up after one of the later daily meals. The addition of periodicals and photographs to that process will have little impact. Furthermore, there are already policies in place which control the volume of periodicals and photographs inmates in various housing categories are permitted to receive

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[14] For the first time, the Department makes a deterrence argument in connection with this factor; one that it did not advance in the courts below. It contends that "[e]xcluding those privileges from the management arsenal of prison administrators would diminish the severity of Level 2, with the "ripple effect" of diminishing its value . . . as a deterrent to serious misconduct by other inmates. . ." [*Petitioner's Brief* at p. 31]

as well as censorship policies regulating the content of those items.[15] The volume policies can readily be amended to incorporate a specific provision for Level 2 inmates and the censorship standards can be applied to their receipt of secular publications and photographs, thus enabling the Department to protect its security and rehabilitative interests.

D. There Are Easy Alternatives to a Total Ban of Secular Periodicals and Personal Photographs [Factor Four]

Turner's last factor focuses on the availability of "ready alternatives" to a challenged policy. *Turner*, 482 U.S. at 90. "When prison officials are able to demonstrate that they have rejected a less restrictive alternative because of *reasonably founded fears* that it will lead to greater harm [or significant administrative inconvenience], they succeed in demonstrating that the alternative they in fact selected was not an 'exaggerated response' under *Turner*." *Thornburgh*, 490 U.S. at 419 (emphasis added). On the other hand, if an inmate can show an alternative that fully accommodates his rights at "*de minimus* cost" to valid penological interests, this is evidence that a policy is not reasonable, but is an 'exaggerated response' to prison concerns. *See Turner*, 482 U.S. at 97-98. When there is "substantial evidence in the record to indicate that officials have exaggerated their response to [penological] considerations," the need to defer to their judgment dissipates. See *Jones*, 433 U.S. at 128. Under this factor, a court is to "consider whether the presence of ready alternatives undermines the reasonableness of the regulations." *Overton*, 539 U.S. at 136. While this factor is not a "least restrictive alternative" test where prison administrators are required to

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[15] *See PA. DEPT. OF CORRECTIONS*, Policy Statement DC-ADM 803, "Inmate Mail and Incoming Publications", *available at http://www.cor.state.pa.us/standards/lib/standards/DC-ADM_803_Inmate_Mail_and_Incoming_Publications1.pdf* (visited February 10, 2006).

"set up and then shoot down every conceivable alternative method of accommodating" an inmate's constitutional right, "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Turner*, 482 U.S. at 90-91. "[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Turner*, 482 U.S. at 91.

In the proceedings below, the Level 2 prisoners pointed to an easy alternative suggesting that LTSU officers deliver a periodical to an inmate's cell for a limited period of time and retrieve the newspaper or magazine when the time expires. The Court of Appeals found that alternative acceptable under *Turner's* third and fourth factors, reasoning:

> Banks proposes [that] . . . the DOC could establish a specific reading period, or several different reading periods, in which guards deliver a single newspaper or magazine to an inmate's cell, if requested, and retrieve it at the close of the period. The DOC could easily control the number of periodicals in his cell at one time, the frequency of the distributions, the amount of time any inmate would be in possession of the materials, as well as the number of inmates who would have the periodicals in their cells at any one time. The DOC could also limit the total number of photographs a Level 2 inmate could have in his cell at one time to what they consider a reasonable number. In conjunction with this policy, access to periodicals could be entirely withheld from those individual prisoners who, in the judgment of prison officials, *would* pose a particular risk given their records, or those inmates who *have* abused their use of periodicals or photographs. . .

Banks, 399 F.3d at 146-147.

This approach is consistent with *Turner* where a Missouri marriage regulation was found to be an exaggerated response to security objectives. *Turner* concluded that there was an easy alternative to the broad prohibition against inmate marriages at issue in that case, namely, that the right to marry could be accommodated by generally permitting marriages to take place "but not if [the] warden finds that it presents a threat to security or order of [the] institution, or to public safety." *Turner*, 482 U.S. at 97-98. As noted previously, the Department's policy already contemplates a suspension or loss of an LTSU inmate's privileges if his behavior is deemed to warrant either. [JA 33] An existing LTSU rule provides for the confiscation of any item in an inmate's cell that is altered or misused. [See JA 34] Applying these regulations to newspapers, magazines and photographs on Level 2 will not, for the reasons expressed above, be burdensome.

CONCLUSION

For the reasons expressed above, the Department of Correction's policy of denying Level 2 inmates access to secular newspapers, magazines, and photographs is not reasonably related to the security and rehabilitation objectives cited by the Department either because it bears no *rational relationship* or is an *exaggerated response* to those objectives. As such, it violates the inmates' First Amendment right to freedom of speech and the Circuit Court's decision should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JEFFREY BEARD,
Petitioner

v.

RONALD BANKS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ARGUMENT

I. This Case Closely Resembles *Overton v. Bazzetta*, A Decision Which Respondent Neither Criticizes Nor Distinguishes.

As we said in our opening brief, the circumstances of this case are strikingly similar to those of *Overton v. Bazzetta*, 539 U.S. 126 (2003), in which the Court upheld Michigan rules which entirely banned visits to certain prisoners. In this case as in *Overton*, prison officials have imposed restrictions which implicate interests protected by the First Amendment: here an interest in receiving information from the outside world, and in *Overton* an interest in intimate association. *Id.*, at 131.[1] In this case as in *Overton*, the restrictions completely close off certain avenues for exercising those interests: here a ban on receiving newspapers, magazines and photographs, and in *Overton* a ban on visits, including even non-contact visits and visits from immediate family. *Id.*, at 130. In both cases, the restrictions are imposed for an indefinite period,[2] and are restored at the discretion of prison officials. *Ibid.* In both cases, the restrictions are applied to high-security prisoners who present disciplinary problems and who have "few privileges left to lose." *Id.*, at 134.[3] Finally, in

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[1] The Court in *Overton* found it unnecessary to decide whether or to what extent the asserted right of association survived incarceration. *Id.*, at 131-132.

[2] The regime upheld in *Overton* was in this respect more severe than Pennsylvania's. The ban on visits in *Overton* applied for a minimum of two years, *id.*, at 130, while the ban challenged in this case applies for a minimum of ninety days. J.A. 32.

[3] Again, in this respect the *Overton* regime was more severe than Pennsylvania's. Pennsylvania's restrictions apply only to the 0.1% of its prisoners who present the worst behavioral problems in the system, Br. for Pet. 3-6, while the

both cases prison officials sought to justify the restrictions – successfully, in *Overton* – as "a proper and necessary management technique to induce compliance with the rules of inmate behavior...." *Id.*, at 134.

Respondent and his amici do not ask the Court to overrule or limit *Overton*, nor do they make any serious attempt to distinguish this case from *Overton*; like the Court of Appeals, they simply proceed as if *Overton* was never decided at all. But if Michigan's restrictions, which banned visits but allowed newspapers, were constitutional, then it is difficult to see why Pennsylvania's restrictions, which ban newspapers but allow visits, are not. Certainly, respondent and his amici have offered no principled basis for such a departure from *Overton*.

II. Respondent's Challenge Is Properly Evaluated Under The Deferential Standard Of *Turner v. Safley*.

Respondent, for his part, concedes that the ultimate question in this case is whether Pennsylvania's policy is "'reasonably related to legitimate penological interests,'" Br. for Resp. 15, *quoting Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989), and that this question must be answered by applying the analytical framework of *Turner v. Safley*, 482 U.S. 78 (1987). Br. for Resp. 15-16. Some of his amici, however, urge the Court not to apply *Turner* at all, but instead to use some more heightened standard of review.[4] *See* Br. of American

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restrictions in *Overton* applied to all prisoners who committed two or more substance-abuse violations. *Id.*, at 130.

[4] Another issue raised by amici – that Pennsylvania's policy engages in impermissible "viewpoint discrimination" because it exempts legal and religious materials from its publications ban, *see* Br. for Prison Legal News *et al.* 16-17 – is not in this case at all. Respondent has never challenged

Civil Liberties Union *et al.* 4-14; Br. of Becket Fund for Religious Liberty 5-12. To some extent, their arguments are premised on the idea, as the brief for the United States puts it, "that prison privileges that implicate First Amendment interests are categorically different from other privileges." Br. for United States 25 n. 12; *see* Br. of ACLU 10-14. As we have already noted, however, the Court has consistently made it clear that *Turner's* deferential standard applies to challenges involving such privileges. *See* Br. for Pet. 21-22 (collecting cases); Br. for United States 25 n. 12.

In other respects, their argument is simple hyperbole. The repeated refrain of the amici, that the logic of our position has "no stopping point," Br. of ACLU 9; Br. of Becket Fund 3, seems to us a non sequitur which ignores the context in which Pennsylvania imposes its restrictions: as a final attempt to improve the behavior of the most dangerous and recalcitrant prisoners in its system, who have already failed to respond to lesser sanctions. We do not understand how our position could be taken to allow similar restrictions to be imposed upon all prisoners, whether or not they have misbehaved, *cf.* Br. of Becket Fund 9-11; it is difficult to see how either rehabilitation or security would be served by seeking to "modify" the behavior of prisoners who in fact have abided by prison rules. Still less do we understand how it could be thought to support *content-based* restrictions on speech disfavored by prison officials. *Cf.* Br. for ACLU 13. Such attempts, it seems to us, can rather easily be dealt with within the *Turner* framework.

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the policy on this basis. We note that the policy challenged in *Overton* likewise contained religious and legal exemptions from the ban on visits. *See id.*; 539 U.S. at 130. *See also* Br. for United States 17 n. 5 (Pennsylvania's policy is "neutral" within the meaning of *Turner*).

But the amici's main argument for discarding *Turner* in this case seems to be that Pennsylvania's LTSU policies, and particularly the justification offered to support them, are so different in kind from anything the Court has considered before that they should fall entirely outside of *Turner*. Thus, to one amicus, Pennsylvania has offered "a unique theory – the deprivation theory of human behavior" to support its policies, a theory which, in the amicus' view, is "incompatible with maintaining inmates' most fundamental constitutional rights." Br. of Becket Fund for Religious Liberty 3, 5. To another, Pennsylvania's goal of modifying respondent's violent and destructive behavior – which that amicus calls "general deterrence" – should simply be "rejected as illegitimate." Br. of ACLU 5 & n. 2. What these amici call "deprivation theory" and "general deterrence," however, is in our view just the common-sense idea that prisoners – like other people – are likely to respond to a regime of incentives and disincentives, and that prison administrators may legitimately rely on this fact to encourage decent behavior. Despite what these amici say, we submit that this idea is neither new nor untoward, and that it fits comfortably within *Turner's* framework.

As the Court has long recognized, regimes of rewards and punishments, to encourage desired behavior and to discourage and punish misbehavior, are a virtually universal feature of prison administration, *see, e.g., McKune v. Lile*, 536 U.S. 24, 30-31 (2002); *Sandin v. Conner*, 515 U.S. 472, 474-476 (1995); *Wolff v. McDonnell*, 418 U.S. 539, 545-549 (1974), and the Court has repeatedly recognized as legitimate the intertwined goals of institutional order, security and rehabilitation which such programs serve. *Overton*, 539 U.S. at 134 ("Withdrawing ... privileges is a proper and necessary management technique to induce compliance with the rules of inmate behavior..."); *McKune*, 536 U.S. at 39 ("An essential tool

of prison administration ... is the authority to offer prison inmates various incentives to behave").

The granting and withdrawal of privileges with First Amendment implications is a routine feature of many such programs.[5] *See, e.g., Overton*, 539 U.S. at 130 (visits); *McKune*, 536 U.S. at 30-31 (television); *Little v. Norris*, 787 F.2d 1241, 1243 (8th Cir. 1986) (personal correspondence); *see* Br. for Pet. 2 (describing Pennsylvania's disciplinary regime). But the Court has never suggested that the presence of this feature deprives such programs of the legitimacy they would otherwise enjoy, or imposes a need for any special justification beyond the obvious ones of order, security and rehabilitation. Certainly, the Court has never adopted the view of respondent's amici, that such privileges may not be withdrawn as a sanction for misbehavior in general, but only in response to specific abuses of the privileges. *See* Br. for ACLU 6. *Overton*, for example, did not hold that visitation privileges could only be withdrawn as a sanction for using visitors to smuggle drugs; and we are aware of no decision holding that, say, television privileges may only be withdrawn as a sanction for over-loud volume.

Once accepted, it is this idea – that privileges with First Amendment implications may only be withdrawn if they are specifically abused – which would have "no stopping point." While the amici carefully frame their argument in terms of prisoners' ability to learn about "political affairs and other news," Br. of ACLU 11, the interests protected by the First Amendment also encompass "the right ... to receive ... access to social ... esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Nor are First Amendment protections limited to print

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[5] As the United States points out, many of the most desirable privileges have such implications. Br. for United States 25 n. 12.

media. *See U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). In evaluating prison disciplinary systems, then, it would be impossible for the courts to draw any principled line between print and broadcast media, or between "political affairs and other news" on the one hand, and current events, sports, cultural events, education, and entertainment on the other. *See Shaw v. Murphy*, 532 U.S. 223, 230 (2001) (declining to assess the "value of ... content" in prison First Amendment case). The amici's principle, then, would certainly call into question a wide array of disciplinary sanctions – for example, access to television – which are routinely imposed and have never been thought to be constitutionally problematic.

The restrictions which Pennsylvania imposes on prisoners in the LTSU are no different in kind from those just discussed,[6] and the penological interests which Pennsylvania has proffered to support its policies are no different in principle from those offered in *Overton* and *McKune*. Respondent's challenge to those restrictions, like the challenges in *Overton* and *McKune*, can and should be discussed within *Turner's* analytical framework, and we turn next to that subject. –

III. The Restrictions Challenged In This Case Are Reasonably Related To The Legitimate Penological Interests Of Rehabilitation And Security.

1. As we said in our opening brief, Pennsylvania's policy of withdrawing and reinstating newspaper privileges – like the withdrawal and reinstatement of visiting privileges in *Overton* – has a "logical connection," *Turner*, 482 U.S. at 93 n.*, to important penological goals. By providing incentives for "inmate

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[6] They may, of course, differ in degree, but in the case of *Overton*, as we discussed above, even that is debatable. *See supra* at 1-2.

growth," J.A. 190, to these most difficult and intractable prisoners, the policy offers an opportunity for them to begin the process of becoming productive citizens, or at least to integrate into the general prison population.[7] J.A. 189. In addition to this rehabilitative goal, the policy serves prison security interests in two distinct ways. First, "rehabilitation" in this context means that the affected prisoners cease the violent and destructive behaviors which landed them in progressively more severe confinement in the first place; in this sense, rehabilitation and security are inextricably intertwined. Second, the policy reduces the opportunity for prisoners to do further damage by eliminating materials which can be used as crude tools, weapons or fuel.

To this, respondent and his amici make two equally odd responses. First, as to rehabilitation, they say that the deprivations imposed by Pennsylvania's policy are at once so draconian that the Court should subject the policy to the most searching review, *and* so trifling that no reasonable person could rationally think that they might achieve their goal of modifying behavior. *See* Br. for Resp. 22 ("how could Department officials have *reasonably* entertained the view that withholding a newspaper or a few photographs might succeed?") (emphasis in original); Br. of ACLU 20-21. This, of course, simply ignores the evidence that the policy has in fact had some success. When the record was made in this case, the LTSU had only been in existence for a

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[7] One of respondent's amici emphasizes the rehabilitative value of "allowing prisoners to become or remain informed and engaged citizens." Br. of ACLU 6. Whatever might be the merits of this idea as a general matter, it, like so much else said by and on respondent's behalf, ignores the context of this case. Allowing *these* prisoners access to newspapers and magazines has been signally ineffective in getting them even to follow prison rules, let alone become "informed and engaged citizens."

little over two years, and in that time had received a little over fifty prisoners. Of these, thirteen – about 25% – had either moved up from Level 2 to Level 1,[8] or had "graduated" out of the LTSU altogether.[9] While these results do not establish that the LTSU is a panacea for reforming intractable prisoners, they are far from negligible, and they are certainly enough to provide the "logical connection" which *Turner* requires.

Second, respondent argues that the ban on newspapers and magazines has no logical connection to furthering security, because the prisoners in Level 2 are permitted to have legal and religious materials which, in his view, could also be used improperly. Br. for Resp. 19-20. Apparently, respondent believes that Pennsylvania's policy is unconstitutional because it is not restrictive *enough*. Be that as it may, his view is not supported by either common sense or the judgment of prison officials. Unlike yesterday's newspaper, religious and legal materials are apt to retain their value to prisoners and thus are less likely to be used for mischief; Deputy Superintendent Dickson thought it "obvious[]" that prisoners are "less inclined to use their legal work or their religious materials" for improper purposes. J.A. 189. The policy's "logical connection" to security is thus not undermined at all by allowing Level 2 prisoners to have religious and legal materials.

2. Respondent and his amici attempt to support their view that the prisoners in Level 2 have no alternative means of communicating with the outside

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[8] Level 1 prisoners are permitted one newspaper and five magazines. J.A. 102.

[9] When Deputy Superintendent Dickson was deposed in August of 2002, thirty-six prisoners were held in Level 2 of the LTSU. J.A. 130. Three were held in Level 1, *ibid*, and ten more had "graduated" out of the LTSU altogether. J.A. 138. Two other prisoners had completed their sentences and been released from the LTSU to the community. *Ibid.*

world by characterizing these prisoners as "isolated," Br. for Resp. 11, "cut off," Br. of ACLU 10-11, and even "amputate[d]," Br. for Prison Legal News 4, from all sources of information. Like the prisoners in *Overton*, they see their alternative channels of communication and information – unlimited personal correspondence, visits from family, attorneys and chaplains, and books from the prison library – as insufficient, and like the prisoners in *Overton*, they are mistaken; as the Court said there, "[a]lternatives ... need not be ideal; they need only be available." *Id.* 539 U.S. at 135. One amicus, perhaps realizing this, suggests that the very availability of these alternatives "undermines the system of incentives necessary to the operation" of Pennsylvania's policy. Br. of Becket Fund for Religious Liberty 15. But of course, this is not so, precisely because those alternatives are *not* "ideal." In *Overton*, for example, the availability of correspondence as an alternative to in-person visits did not mean that visits were of no value to the *Overton* prisoners, nor did it undermine the value of those visits as an incentive to better behavior.

3. Respondent suggests that, instead of an outright ban on newspapers and magazines, prison officials should adopt what he calls the "easy alternative" of "deliver[ing] a periodical to an inmate's cell for a limited period of time and retriev[ing] the newspaper or magazine when the time expires." Br. for Resp. 29. This, in his view, would adequately address the security concerns which arise from the potential misuse of newspapers and magazines, and like the Court of Appeals, he brushes aside the costs associated with this measure.[10] Br. for Resp. 28-30; *see* Pet. App. 22a-

[10] Respondent does not endorse the Court of Appeals' other suggestion: escorting prisoners to the law library to read periodicals of their choosing, *see* Pet. App. 23a-24a, and it is easy to see why. The prisoners in Level 2 of the LTSU are so dangerous that only one may be released from his cell at

23a. Even on its own terms, this attempt to second-guess the judgment of prison administrators is unconvincing. Respondent's delivery-and-retrieval system would do nothing to prevent misbehavior before, or at the time of, the retrieval, nor would it be an "easy" matter to ascertain that every page of every prisoner's paper – say, the Sunday *New York Times* – had in fact been "retrieved."

The more important point is that respondent and his amici, like the Court of Appeals, simply ignore the policy's rehabilitative goals. The prisoners subject to the publications ban have "few other privileges left to lose," *Overton*, 539 U.S. at 134, and prison officials are "very limited in what we can ... give or deny" to them. J.A. 190. Respondent advances no alternative means by which prison officials can advance their important interests in persuading these prisoners to change their violent and destructive behavior. The only "alternative" left, then, is for prison officials simply to give up on rehabilitation, and to content themselves with physically restraining these prisoners from doing further damage, if necessary forever – or until they are set loose, un-rehabilitated, upon the outside world.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals and remand the case with instructions to affirm the judgment of the District Court.

Respectfully submitted,

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any given time, and even then only with two guards and elaborate security precautions. J.A. 80-81, 191. The burden of the many additional trips to the law library which such a procedure would entail would be no small matter.

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In the Supreme Court of the United States

JEFFREY A. BEARD, PETITIONER

v.

RONALD BANKS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether, under the standard set forth in *Turner* v. *Safley*, 482 U.S. 78 (1987), prison officials may deny newspapers, magazines, and photographs to the most dangerous and recalcitrant inmates until they exhibit improved behavior.

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In the Supreme Court of the United States

No. 04-1739

JEFFREY A. BEARD, PETITIONER

v.

RONALD BANKS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case raises the question whether, under the standard set forth in *Turner* v. *Safley*, 482 U.S. 78 (1987), prison officials may deny newspapers, magazines, and photographs to the most dangerous and recalcitrant inmates until they exhibit improved behavior. The United States has a substantial interest in the proper application of *Turner* to claims by inmates raising First Amendment challenges to restrictions on their privileges. The Federal Bureau of Prisons (BOP) operates more than 100 penal institutions, which house more than 180,000 inmates. Under BOP regulations, prison officials have discretion to suspend or limit the privileges of inmates who violate prison rules in order to create incentives for good behavior. See 28 C.F.R. 541.13 table 4, para. 2(g). BOP regulations also impose significant limitations on the privileges of inmates placed in disciplinary segregation for their misconduct, including impoundment of personal property and restrictions on the books that any such inmate may possess. See 28 C.F.R. 541.21(c)(7)-(8). The United States has participated as an amicus or party in several cases involving the application of *Turner* to prison restrictions challenged under the First Amendment. See, *e.g.*, *Overton* v. *Bazzetta*, 539 U.S.

126 (2003); *Shaw* v. *Murphy*, 532 U.S. 223 (2001); *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989).

STATEMENT

Before the nineteenth century, imprisonment was rarely used as punishment for criminal offenses in America and, instead, more harsh measures were commonly applied. See Lawrence M. Friedman, *Crime and Punishment in American History* 48 (1993). The modern prison system took root in the nineteenth century as States adopted rehabilitation as a primary goal of the penal system. See *id.* at 76-80, 159-163. Since then, prison administrators at the state as well as the federal level have expended great effort—often through experimentation with different approaches—to finding ways of encouraging inmates to behave within prison walls and rehabilitating them for introduction back into society. The prison restrictions at issue in this case represent one State's efforts to encourage better behavior among inmates who have proven themselves to be among the most dangerous and recalcitrant inmates in the State's prison system.

1. a. In Pennsylvania's prison system, inmates housed in the general population who commit disciplinary infractions and disrupt the orderly operation of their facility are subject to transfer to a more secure housing unit and a corresponding restriction of their privileges. Pennsylvania maintains three levels of secure housing units for inmates segregated from the general population because of their misconduct: (i) Restricted Housing Units (RHUs); (ii) Special Management Units (SMUs); and (iii) a Long Term Segregation Unit (LTSU). At each level, there is a graduated increase in security measures and an associated reduction of privileges available to inmates. Pet. App. 47a; Br. in Opp. App. 50-51, 59.

Among the three levels, RHUs contain the least restrictive conditions, and serve principally to house inmates placed in disciplinary custody for their misconduct. The next level, SMUs, "house inmates who exhibit behavior that is continu-

ally disruptive, violent, dangerous or a threat to the orderly operation of their assigned facility," and who "may have been repeatedly subject to disciplinary action or investigation(s)." The most restrictive level, the LTSU, houses "the extremely disruptive, violent and problematic inmates," who "have demonstrated an inability or unwillingness to conform to the requirements of general population." Inmates may be considered for transfer to the LTSU if they "have continually manifested a negative influence on the safety and security of the [Pennsylvania] Department of Corrections, have not suitably progressed in an SMU, or have reportedly perpetuated criminal activity that threatens the community." Br. in Opp. App. 59; see Pet. App. 3a-4a.

The LTSU "provide[s] extremely high levels of security and sharply reduce[s] the privileges permitted." Br. in Opp. App. 59. LTSU inmates must wear physical restraints when they leave their cells and must be escorted by two corrections officers, and only one LTSU inmate is permitted outside his cell at any particular time. Pennsylvania presently maintains one LTSU, and has determined that no more than 40 of its 38,000 inmates statewide may be assigned to the LTSU. The LTSU population thus is limited to the 0.1% of the Commonwealth's prison population that presents the most intractable disciplinary problems and that, accordingly, presents the greatest challenges in maintaining institutional order and in achieving the Commonwealth's rehabilitative goals. Pet. App. 3a n.1, 4a, 35a; Br. in Opp. App. 92, 94-95, 111.

b. Inmates who are transferred to an SMU or the LTSU generally have no fixed date of release from those restricted units, but they can gain a relaxation of the restrictions on their privileges—and ultimately can obtain their release back into the general population—by demonstrating progress in their behavior and adjustment. An SMU contains five phases, with the last phase amounting to a probationary period in the general population. SMU inmates are "given the opportunity to progress through [the] specific phases * * * based upon

their behavior and ability to adjust under reduced levels of supervision." Br. in Opp. App. 65. Promotion from one phase to another, for instance, can result in increased visitation, radio, television, telephone, and commissary privileges, and can also earn an inmate the ability to leave his cell without physical restraints. *Id.* at 66, 71, 73-75, 77; see Pet. App. 47a.

The LTSU is principally comprised of inmates who failed to progress in an SMU. Br. in Opp. App. 21, 95. When this litigation commenced, the LTSU contained two phases, LTSU1 and LTSU2.[1] All inmates reassigned to the LTSU must initially spend a minimum of 90 days in LTSU2, the more restrictive of the two phases. *Id.* at 93. After that initial 90-day period, LTSU2 inmates receive an individualized progress review every 30 days, *id.* at 20, and inmates "who have demonstrated a satisfactory adjustment" may be promoted to LTSU1 status, *id.* at 21, 26-27, 67-68. LTSU1 "provides for increased programming and privileges," including with respect to visitation, telephone, and commissary privileges, as well as educational programs. *Id.* at 21-22, 32, 77; see Pet. App. 47a. Prison officials also have discretion to authorize additional privileges for an LTSU1 inmate on an individualized basis. Br. in Opp. App. 21-22.

An inmate ultimately can gain release from the LTSU by demonstrating "positive adjustment." Br. in Opp. App. 20. LTSU inmates "may be considered for release at any time and at least annually," and release "can be to a SMU, RHU, general population or other appropriate facility." *Id.* at 28.

c. Pennsylvania's general policy of granting and withholding inmate privileges as a means of inducing good behavior is reflected in the rules concerning the extent to which SMU and LTSU inmates may keep newspapers, magazines, and photographs in their cells. While each SMU inmate may possess at

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[1] We are advised by Pennsylvania that it has recently modified the LTSU such that it now contains four phases instead of two. That modification does not affect the Court's consideration of this case, as the initial stage continues to contain the same restrictions that are at issue here.

least one newspaper and ten photographs in his cell, the number of magazines that he may retain varies from zero to ten, depending on his progress through the five SMU phases. See Pet. App. 47a; Br. in Opp. App. 70, 77. SMU inmates who reach the final, probationary phase may retain in their cells the same number of newspapers, magazines, and photographs as inmates in the general population. *Id.* at 70.

Inmates transferred to the LTSU are subject to more substantial restrictions on their possession of newspapers, magazines, and photographs. LTSU2 inmates are barred from possessing any newspapers or magazines in their cells, but a promotion to LTSU1 enables an inmate to retain one newspaper and five magazines. See Pet. App. 3a-4a; Br. in Opp. App. 32, 70, 77. In addition, both LTSU2 and LTSU1 inmates are barred from possessing any personal photographs. LTSU inmates may, however, retain two leisure books, and may also receive unlimited personal correspondence. The correspondence may include clippings from newspapers and magazines only if the particular article concerns the inmate or his family. Pet. App. 4a; Br. in Opp. App. 32, 104, 106. The LTSU restrictions do not extend to religious and legal materials. See Pet. App. 4a.

2. a. Respondent was confined in the LTSU, and held as a "Phase 2," *i.e.*, LTSU2, inmate. Br. in Opp. App. 2. On October 18, 2001, respondent, on behalf of a class of all LTSU2 inmates, brought this action against petitioner, the Secretary of the Pennsylvania Department of Corrections. The action alleges that Pennsylvania's policy of denying newspapers, magazines, and photographs to LTSU2 inmates is invalid under the First Amendment, and it seeks declaratory and injunctive relief that would categorically bar enforcement of that policy. Pet. App. 5a; Br. in Opp. App. 8-9.[2] On March 22,

[2] Although the complaint is not explicitly styled as either a facial or an as-applied challenge, the suit is framed in the nature of a facial challenge to the prison restrictions. The complaint was filed as a class action on behalf of all LTSU2 inmates, it alleges that the prison restrictions are unconstitutional

2002, the district court granted respondent's motion for class certification. Pet. App. 6a.

The only witness to give deposition testimony during discovery was Joel Dickson, a Deputy Superintendent of Corrections who is responsible for supervising the LTSU. See Pet. App. 5a, 36a; Br. in Opp. App. 90. Dickson observed that LTSU2 inmates "are the most incorrigible, the most difficult, problematic" inmates, and that they "have demonstrated the most behavior conflicts." *Id.* at 95. He further testified that the "most important" reason for imposing the challenged restrictions on those inmates' privileges "is as a means of behavior modification. And by that, I mean that a privilege is an earned thing based on compliance and modification of negative behaviors." *Id.* at 110; see *id.* at 113.

Dickson explained that, "we try to give and provide the inmate every opportunity to progress through this system and to be able to obtain these privileges. We're very limited * * * in what we can and cannot deny or give to an inmate, and these are some of the items that we feel are legitimate as incentives for inmate growth." Br. in Opp. App. 110. In the LTSU, accordingly, "the privilege of being able to read a newspaper or a magazine" is viewed as "an earned privilege," in the sense that an inmate, by adjusting his behavior, "can earn their right to have those items in his cell and read them at his leisure." *Id.* at 111. The ultimate objective is "to do the best we can to modify the inmate's behavior so that" he can "integrate into the general population in the institution" and

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because they "categorically" deny LTSU2 inmates access to newspapers, magazines, and photographs, Br. in Opp. App. 8, and it seeks declaratory and injunctive relief that would prevent application of the restrictions against any LTSU2 inmate, *id.* at 9. In addition, the court of appeals entertained respondent's challenge as a facial challenge to the restrictions, holding that they were invalid without any analysis of their application to particular facts. See Pet. App. 25a; see also *id.* at 26a (Alito, J., dissenting) ("The question before us is whether these * * * restrictions are facially unconstitutional under the standard set out in *Turner* v. *Safley*."). In any event, the court of appeals' analysis is erroneous as applied to respondent for the reasons explained below.

"eventually * * * can become a more productive citizen." *Id.* at 110.

b. In September 2002, the parties filed cross-motions for summary judgment. Pet. App. 6a. Petitioner did not dispute that inmates retain a First Amendment right to receive newspapers, magazines, and photographs, but argued that Pennsylvania's policy represented a valid restriction of that right under the analysis set forth in *Turner* v. *Safley*, 482 U.S. 78 (1987). See Pet. App. 8a n.5, 39a n.33. On January 10, 2003, the district court, adopting the magistrate judge's recommendation, granted summary judgment to petitioner. The court held that the State's policy of denying newspapers, magazines, and photographs to LTSU2 inmates does not violate the First Amendment under *Turner*. The court explained that the restrictions are reasonably related to the legitimate penological interest of "furthering prison security and encouraging compliant behavior in particularly disobedient and rebellious inmates," *id.* at 39a, and, indeed, that the restrictions are "imperative to the success of the LTSU," *id.* at 40a.

3. A divided court of appeals vacated the district court's decision and remanded the case. Pet. App. 1a-29a.

a. The panel majority acknowledged that the objective of deterring inmate misconduct is legitimate under the *Turner* standard, but viewed the challenged restrictions as bearing no rational relationship to that objective. Pet. App. 11a-14a. According to the majority, "the rehabilitation justification [is] illogical given the nature of LTSU confinement." *Id.* at 12a. The majority reached that conclusion on the basis that LTSU2 confinement has no fixed duration and that promotion to LTSU1 is "entirely within the discretion of prison administrators." *Id.* at 11a. The majority also emphasized that Pennsylvania had "offered no evidence that the [LTSU restrictions] achieve[] or could achieve [the] stated rehabilitative purpose." *Id.* at 12a-13a. The majority explained that, in its view, the requirement of producing such evidence is a "complementary part of the [*Turner*] analysis in determining

whether an asserted goal is logically connected to the prison regulation." *Id.* at 14a n.10.

In addition to concluding that the restrictions had no logical connection to the objective of inducing good behavior, the majority observed that LTSU2 inmates had no alternate means of obtaining "access to a reasonable amount of newspapers, magazines, and photographs." Pet. App. 20a. The majority suggested two, less-restrictive policies that Pennsylvania could adopt: (i) establishment of specific "reading periods" in "which guards deliver a single newspaper or magazine to an [LTSU2] inmate's cell"; or (ii) a program under which an LTSU2 inmate could be escorted by guards "to the secure mini-law library to read a periodical of [his] choosing." *Id.* at 22a-23a.

b. Judge Alito dissented. Pet. App. 25a-29a. In his view, it was rational for prison officials to believe that the challenged restrictions could deter inmates from violating prison rules and could induce inmates already in the LTSU to reform their behavior. *Id.* at 27a. Judge Alito concluded that the panel majority had misapplied *Turner* by requiring "empirical evidence that the regulation in fact serves" those objectives, rather than assessing whether the restrictions bear a "*logical connection*" to the asserted goals. *Id.* at 28a (quoting *Turner*, 482 U.S. at 89) (emphasis added by Judge Alito). In addition, Judge Alito observed that LTSU2 inmates can ultimately remove the restrictions on access to reading materials and photographs by modifying their behavior. *Ibid.* Judge Alito also explained that the two alternate policies suggested by the majority would impose significant burdens on prison administration. Accordingly, Judge Alito concluded that, under *Turner*, "the challenged regulations are not facially unconstitutional." *Id.* at 29a.[3]

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[3] In the proceedings below, Pennsylvania advanced two penological justifications for the challenged restrictions. The "first and most important," or "primary" justification offered by Pennsylvania was that the restrictions deter inmate misconduct and induce LTSU inmates to reform their behavior. Br. in

SUMMARY OF ARGUMENT

Respondent's First Amendment challenge to Pennsylvania's policy restricting the possession of newspapers, magazines, and photographs by its most incorrigible inmates is governed by the deferential standard set forth in *Turner* v. *Safley*, 482 U.S. 78 (1987). As this Court has repeatedly recognized, *Turner* is grounded on the recognition that courts should defer to the reasonable judgments of prison officials on the difficult and sensitive matters of prison administration. Under *Turner*, accordingly, a prison regulation is valid as long as it is reasonably related to legitimate penological interests. In addition, in a facial challenge, like this one, a prison regulation is valid as long as it is capable of being applied in a manner that meets that reasonable-relationship test. See *Overton* v. *Bazzetta*, 539 U.S. 126, 134 (2003).

The central consideration under *Turner*'s reasonableness framework is whether the challenged regulation bears a "logical" connection to legitimate penological goals. *Turner*, 482 U.S. at 89. The challenged restrictions on LTSU2 inmates aim to deter inmate misconduct and to induce the most dangerous and recalcitrant prisoners in Pennsylvania's prison system to change their ways. Those objectives relate directly

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Opp. App. 110, 113; see Pet. App. 5a, 36a. Pennsylvania also offered as a secondary justification that the restrictions promote security by limiting the amount of materials in an inmate's possession in which contraband could be hidden, and by preventing use of the prohibited materials as weapons or instruments of harm. See Pet. App. 5a, 36a-37a; Br. in Opp. App. 110. Judge Alito would have sustained the restrictions based solely on the primary, rehabilitation rationale, and he did not discuss the secondary rationale advanced by Pennsylvania below. Likewise, because it is a sufficient basis to uphold the restrictions under *Turner*, the Commonwealth's principal rehabilitation rationale is the focus of this brief as well. The Commonwealth's rehabilitation objective, however, has an important security dimension because encouraging inmates to reform their deviant behavior promotes institutional order and, thus, security within the prison walls. See pp. 16-17, *infra*. That is particularly true with respect to the special class of inmates subject to the restrictions at issue in this case, *i.e.*, the "worst of the worst." Br. in Opp. App. 111.

to promoting rehabilitation of recalcitrant inmates and preserving institutional order by encouraging good behavior and discouraging misconduct, and they unquestionably are "legitimate" objectives under the *Turner* standard.

The challenged restrictions on LTSU2 inmates also bear the requisite, logical connection to those governmental interests. The "authority to offer inmates various incentives to behave" is an "essential tool of prison administration," and the "Constitution accords prison officials wide latitude to bestow or revoke these perquisites as they see fit." *McKune* v. *Lile*, 536 U.S. 24, 39 (2002) (plurality opinion). The Court therefore has upheld the suspension of visitation privileges for inmates who commit multiple disciplinary infractions, on the rationale that denial of those privileges is a valid means of inducing acceptable inmate behavior. *Overton*, 539 U.S. at 134. The same conclusion follows in this case with respect to the denial of newspapers, magazines, and photographs to the most dangerous and recalcitrant inmates within Pennsylvania's prison system (*i.e.*, those inmates housed in the LTSU). That restriction not only bears a rational connection to the goal of deterring inmate misconduct, but it is an integral aspect of Pennsylvania's graduated approach of granting and withholding privileges to induce acceptable behavior.

The court of appeals erred in reasoning that, because LTSU2 confinement has no preset duration, the challenged restrictions are incapable of deterring inmate misconduct. The uncertain duration of LTSU2 confinement does not remove the incentive of *non*-LTSU inmates to refrain from misconduct so as to avoid transfer to the LTSU, or the incentive of LTSU2 inmates to reform their behavior in the hopes of earning a relaxation of the restrictions, which is possible as soon as the initial 90-day period has expired. The uncertain duration of LTSU2 detention also is entirely rational as penological policy. Rather than impose a predetermined limit on the length of LTSU2 confinement, Pennsylvania sensibly accords prison officials discretion to reinstate the privileges of

the most recalcitrant inmates only upon an individualized determination that any such inmate has in fact reformed his behavior.

The court of appeals also erred in supposing that Pennsylvania was required under *Turner* to accumulate record proof of the efficacy of the challenged restrictions, and in engrafting that evidentiary burden on to *Turner*'s logical-connection test. Under *Turner*, the burden "is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Overton*, 539 U.S. at 132. Moreover, the *Turner* standard only requires that the restrictions logically advance the asserted governmental interest, not that they be demonstrated to do so by empirical proof. In addition, the challenged restrictions advance the State's interest in inducing behavior as a matter of common sense. Unless the fact that the privileges withheld here implicate First Amendment rights somehow makes the privileges inviolate, there is no basis for shifting the burden to the State or requiring empirical proof that prisoners respond to the extension and withdrawal of privileges.

Finally, the remaining considerations under *Turner*'s reasonableness framework reinforce the validity of the challenged restrictions. Because LTSU2 inmates are permitted to receive books and unlimited personal correspondence, they are not barred from possessing all forms of expressive materials. Although inmates have no alternative means of receiving newspapers, magazines, and photographs while they remain in LTSU2, the very object of the restrictions is to deny those materials in order to induce behavioral reform, and LTSU2 inmates retain the alternative of earning reinstatement of their right to receive those materials by demonstrating good behavior. In addition, there is no obvious, ready alternative to the challenged restrictions. Indeed, allowing LTSU2 inmates limited access to newspapers or magazines would negate the basic object of the challenged restrictions by allowing access to those materials without any demonstration of behav-

ioral change, and also would divert corrections officers from other vital institutional functions.

ARGUMENT

A STATE MAY SEEK TO INDUCE IMPROVED BEHAVIOR ON THE PART OF ITS MOST DANGEROUS AND INCORRIGIBLE INMATES BY DENYING NEWSPAPERS, MAGAZINES, AND PHOTOGRAPHS TO THOSE INMATES UNTIL THEY EXHIBIT ACCEPTABLE CONDUCT

In *Turner* v. *Safley*, 482 U.S. 78, 84 (1987), this Court made clear that prison officials rather than courts are to make the difficult judgments inherent in the inordinately difficult task of managing prison inmates, and that the judgments of those officials thus are to be upheld unless they lack a reasonable relationship to valid penological goals. The *Turner* framework rests on "separation of powers concerns" about judicial interference with a task—prison administration—that is "committed to the responsibility of [the executive and legislative] branches," and calls for added deference where, as here, the federal courts are asked to review the judgment of State prison administrators. *Turner*, 482 U.S. at 85. In concluding that the challenged restrictions on LTSU2 inmates have no logical connection to the goal of inducing prisoners to refrain from misconduct, the court of appeals fundamentally misapplied *Turner*, and thus intruded on the prerogatives of the State in responding to an intractable problem of prison administration—*i.e.*, encouraging those inmates who have repeatedly demonstrated an unwillingness to conform their conduct to prison rules to reform their ways.

A. Respondent's First Amendment Challenge Is Governed By The Deferential Standard Set Forth In *Turner* v. *Safley*

1. Although "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner*, 482 U.S. at 84, the nature of confinement dictates

that "[m]any of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner," *Overton* v. *Bazzetta*, 539 U.S. 126, 131 (2003). "[I]ncarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives." *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348 (1987) (citation and internal quotation marks omitted); see *Overton*, 539 U.S. at 131; *Shaw* v. *Murphy*, 532 U.S. 223, 229 (2001); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977).

"In the First Amendment context, for instance, some rights are simply inconsistent with the status of a prisoner or 'with the legitimate penological objectives of the corrections system.'" *Shaw*, 532 U.S. at 229 (quoting *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974)); see *Jones*, 433 U.S. at 129. In addition to recognizing that the exercise of First Amendment privileges by inmates is subject to "the legitimate penological objectives of the corrections system," *ibid.*, this Court has emphasized the need to "accord substantial deference to the professional judgment of prison administrators" when examining "the legitimate goals of a corrections system and * * * the most appropriate means to accomplish them." *Overton*, 539 U.S. at 132; *Shaw*, 532 U.S. at 229; *Turner*, 482 U.S. at 85, 89; *Jones*, 433 U.S. at 126, 128. The Court, accordingly, has "reaffirm[ed] [its] refusal, even where claims are made under the First Amendment, to substitute [its] judgment on . . . difficult and sensitive matters of institutional administration, for the determinations of those charged with the formidable task of running a prison." *O'Lone*, 482 U.S. at 353 (citation and internal quotation marks omitted). Deference to prison officials should be at its zenith when the policy at issue does not deny the exercise of First Amendment rights entirely, but withdraws or extends such rights as part of the process of providing incentives for good behavior.

2. To give effect to those principles, the Court, in *Turner* v. *Safley*, *supra*, established "a unitary, deferential standard for reviewing prisoners' constitutional claims." *Shaw*, 532 U.S. at 229; see *Johnson* v. *California*, 125 S. Ct. 1141, 1149 (2005) (discussing "the deferential standard of review articulated in *Turner* v. *Safley*"). Under *Turner*, a challenged prison regulation is valid as long as it "is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

Turner identified four specific considerations that inform the overarching reasonableness inquiry: (i) whether the challenged restriction is rationally connected to a legitimate government interest; (ii) whether inmates have alternate means of exercising the asserted constitutional right; (iii) whether accommodation of the asserted right would adversely affect other inmates, prison personnel, or prison resources; and (iv) whether there are ready alternatives for achieving the governmental objectives. *Turner*, 482 U.S. at 89-91; see *Overton*, 539 U.S. at 132; *Shaw*, 532 U.S. at 229-230. In applying *Turner*, the burden "is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Overton*, 539 U.S. at 132.[4]

It is undisputed that *Turner*'s deferential inquiry governs the resolution of respondent's challenge to the restrictions on possession of newspapers, magazines, and photographs by LTSU2 inmates. See Pet. App. 5a, 37a-38a. As a general matter, "*Turner* provides the test for evaluating prisoners' First Amendment challenges." *Shaw*, 532 U.S. at 230. And of

[4] As the government has explained in *United States* v. *Georgia* and *Goodman* v. *Georgia*, Nos. 04-1203 & 04-1236, although the *Turner* inquiry affords broad discretion to prison officials, it differs from the minimal rational-basis review applied in the equal protection and due process contexts. See U.S. Reply Br. 13-14. For example, unlike rational-basis review, *Turner* calls for an assessment of the existence of ready and obvious alternatives to the challenged restrictions. See *Turner*, 482 U.S. at 90. Because the court of appeals' decision invalidating the restrictions at issue is fundamentally flawed for the reasons explained below, there is no need in this case for this Court to explore the precise distinctions between rational-basis review and the *Turner* analysis.

particular relevance, the Court has "relied on *Turner* in addressing First Amendment challenges to prison * * * restrictions on receipt of subscription publications" by inmates. *Johnson*, 125 S. Ct. at 1149 (citing *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989)); see *Abbott*, 490 U.S. at 413 ("[W]e now hold that regulations affecting the sending of a 'publication' * * * to a prisoner must be analyzed under the *Turner* reasonableness standard."). Significantly, although the Court has confronted a number of First Amendment challenges to prison regulations since *Turner*, it has yet to sustain any of those First Amendment claims. See *Johnson*, 125 S. Ct. at 1148 (reviewing decisions applying *Turner* to First Amendment claims); *Overton*, 539 U.S. at 128, 131-136; *Shaw*, 532 U.S. at 230-232; *Abbott*, 490 U.S. at 414-419; *Turner*, 482 U.S. at 91-93; see also *O'Lone*, 482 U.S. at 349-353 (claim under Free Exercise Clause). There is no basis for reaching a different result in this case.

B. The Restrictions At Issue Are Part Of A System Of Incentives For Good Behavior And Bear A Rational Connection To Legitimate Government Interests

The "[f]irst and foremost" question under *Turner* is whether there is a "'valid, rational connection' between the prison regulation and the legitimate [and neutral] governmental interest put forward to justify it." *Shaw*, 532 U.S. at 229 (quoting *Turner*, 482 U.S. at 89) (second alteration in original); see *Overton*, 539 U.S. at 132 (if a regulation "bear[s] a rational relation to legitimate penological interests," that "suffices to sustain the regulation"); *Amatel* v. *Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998) ("the first [*Turner*] factor looms especially large"), cert. denied, 527 U.S. 1035 (1999). The governmental interests asserted in this case are undeniably legitimate, and the challenged restrictions are rationally related to those interests.

1. The objectives of inducing acceptable behavior by inmates and thereby promoting prison order and security constitute legitimate governmental interests

The challenged restrictions on LTSU2 inmates aim generally to encourage good behavior, and specifically, to induce reformed behavior in inmates who have repeatedly demonstrated an unwillingness to abide by prison rules. See Pet. App. 5a, 9a-10a; Br. in Opp. App. 95, 110-111. The court of appeals did not dispute that those interests qualify as "legitimate" for purposes of *Turner*. See Pet. App. 10a-11a. And the legitimacy of those interests is well-settled. Indeed, this Court has characterized the "interest in preserving order and authority in the prisons" as "self-evident," *O'Lone*, 433 U.S. at 132, and has explained that "preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of * * * convicted prisoners," *Bell* v. *Wolfish*, 441 U.S. 520, 546 (1979); see *id.* at 548 n.30.

The interests in promoting discipline and order also bear a direct and obvious connection to preserving institutional security, "perhaps the most legitimate of penological goals." *Overton*, 539 U.S. at 133; see *Cutter* v. *Wilkinson*, 125 S. Ct. 2113, 2124 n.13 (2005) ("It bears repetition * * * that prison security is a compelling state interest."); *Abbott*, 490 U.S. at 415. That interest is all the more forceful in this case in view of the particular focus of the LTSU on those inmates who present the greatest threat to institutional security—*i.e.*, the "most incorrigible" and "extremely disruptive, violent and problematic inmates," those with "serious behavioral problems and a high potential for repeating that behavior." Br. in Opp. App. 50, 59, 95. Encouraging such recalcitrant inmates to reform their behavior has long been one of the most pressing challenges of prison administration, and is precisely the sort of "intractable problem[] of prison administration" that calls out for "innovative solutions." *Turner*, 482 U.S. at 89.

The *Turner* analysis is specifically designed to encourage rather than stifle such innovation. *Ibid.*[5]

2. The denial of newspapers, magazines, and photographs to LTSU2 inmates is logically connected to the State's legitimate penological interests

a. It is a matter of common sense that withholding desirable inmate privileges—as a sanction for misbehavior—may deter prisoner misconduct and induce behavioral reform. See *Sandin* v. *Connor*, 515 U.S. 472, 485 (1995) ("Discipline by prison officials in response to a wide range of misconduct * * * effectuates prison management and prisoner rehabilitative goals."). The entire system of prison discipline—and indeed a basic rationale for modern criminal punishment—operates on such an assumption. Accordingly, as this Court has recognized, "[a]n essential tool of prison administration * * * is the authority to offer inmates various

[5] Under *Turner*, the asserted governmental interest must be both "legitimate" and "neutral." See *Abbott*, 490 U.S. at 414-415. Respondent has not suggested that the challenged LTSU2 restrictions infringe the "neutrality" requirement. As a general matter, those restrictions bar possession of newspapers, magazines, and photographs, without regard to the content of those materials. Although there is an exception for legal and religious materials, that exception does not cast doubt on the "neutrality" of the restrictions under *Turner*. A restriction is neutral for *Turner* purposes as long as it furthers a governmental interest that is unrelated to suppression of expression. *Abbott*, 490 U.S. at 415; see *Amatel*, 156 F.3d at 197 ("[N]eutrality, in the [*Turner*] sense is quite different from the familiar First Amendment notion of 'content-neutrality.'"). There could be no serious contention that Pennsylvania's exception for legal and religious materials—which implicates the affirmative rights of inmates to have access to the courts and to engage in the free exercise of religion—somehow suggests an illicit interest in suppression or "censorship" of certain ideas. *Abbott*, 490 U.S. at 416 n.14; see *Overton*, 539 U.S. at 130, 134 (upholding suspension of visitation privileges for inmates with misconduct infractions, where suspension contains exception for visits by attorneys and members of the clergy); *Abbott*, 490 U.S. at 415-416 (When "prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are 'neutral' in the technical sense in which [the Court] meant and used that term in *Turner*.").

incentives to behave," and the "Constitution accords prison officials wide latitude to bestow or revoke these perquisites as they see fit." *McKune* v. *Lile*, 536 U.S. 24, 39 (2002) (plurality opinion). The challenged restrictions in this case fit squarely within that category, and, like the privileges at issue in *McKune*, are designed to address a special class of prison inmates—*i.e.*, "the most disruptive and dangerous .1% of [Pennsylvania's] prison population," Pet. App. 25a (Alito, J., dissenting).[6]

The Court's recent decision in *Overton* v. *Bazzetta*, *supra*, is instructive. The Court there upheld certain restrictions on inmates' visitation privileges, including a prohibition against receipt of any visitors for at least two years (except attorneys and members of the clergy) in the case of any inmate who accumulates more than one substance-abuse violation. See 539 U.S. at 130, 134. The Court upheld that sanction and viewed the objections to it as meriting only relatively brief discussion. The Court explained: "Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose." *Id.* at 134.

So too here. Just like the withdrawal of visitation privileges in *Overton* for multiple substance-abusers, the withdrawal of the privilege of possessing newspapers, magazines,

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[6] In the specific context of privileges denied only as a result of constitutionally adequate disciplinary procedures, the proper focus of analysis may well be the level of First Amendment rights an inmate can enjoy within prison walls, not the situation faced by those inmates who would enjoy substantially greater First Amendment freedoms but for their failure to comply with valid prison rules. At a minimum, the courts must view the denial of access to outside materials as a disciplinary sanction much more leniently than a comparable denial to all inmates. The process of calibrating the extension and withdrawal of privileges to provide adequate incentives for compliance with prison rules is peculiarly ill-suited to judicial second-guessing, and the "ready alternative" of compliance with prison rules to obtain enhanced privileges should figure prominently in the *Turner* analysis. See *Turner*, 482 U.S. at 90.

and photographs for LTSU2 inmates—who by definition have demonstrated a difficulty in following prison rules—"is a proper and even necessary management technique to induce compliance with the rules of inmate behavior." 539 U.S. at 134. The propriety of the restrictions at issue here is especially manifest because LTSU2 inmates are "high-security prisoners who have few other privileges to lose." *Ibid.* The challenged restrictions on LTSU2 inmates thus plainly bear the requisite, logical connection to Pennsylvania's asserted interests in encouraging good behavior and inducing the most recalcitrant prisoners to refrain from further misconduct.[7]

Turner requires according "substantial deference to the professional judgment of prison administrators" with respect to "defining the legitimate goals of a corrections system and * * * *determining the most appropriate means to accomplish them.*" *Overton*, 539 U.S. at 132 (emphasis added). The judgments of prison officials are particularly deserving of deference when, as here, they concern how to deal with inmates who present pronounced disciplinary challenges and threaten institutional order, a subject that lies at the heart of those officials' expertise. The Court therefore has recognized that "*Turner*'s principle of deference has special force with regard to" the treatment of "inmates presenting special disciplinary and security concerns," *Lewis* v. *Casey* 518 U.S. 343, 361 (1996), and that prison officials "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve

[7] Respondent relies heavily (Br. in Opp. 12-16) on this Court's invalidation in *Turner* of a regulation permitting inmates to marry only with the permission of the prison superintendent. See *Turner*, 482 U.S. at 94-99. In invalidating that restriction, however, the Court reasoned that "[c]ommon sense * * * suggest[ed that there is no logical connection between the marriage restriction" and the security concerns raised by the possible "formation of love triangles." *Id.* at 98. In this case, by contrast, there is a common-sense, logical connection between the denial of desirable inmate privileges and the objective of inducing behavioral reform—a connection that this Court specifically recognized in *Overton*. See 539 U.S. at 134.

internal order and discipline," *Bell*, 441 U.S. at 547. See *Cutter*, 125 S. Ct. at 2124 n.13 ("prison security is a compelling state interest, and * * * deference is due to institutional officials' expertise in the area"); *McKune*, 536 U.S. at 39 (plurality opinion).

In view of the common-sense connection between withholding valued inmate privileges and inducing good behavior, as well as the deference owed to prison officials on the precise means of effectuating that objective, there is no basis for concluding that the "logical connection" between the challenged restrictions on LTSU inmates "and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. Far from being arbitrary or irrational, those restrictions are an integral part of Pennsylvania's graduated inmate disciplinary system. That system generally reflects the view that adjusting the privilege of possessing magazines, newspapers, and photographs, constitutes an important means of inducing good inmate behavior, and is part and parcel of a broader common-sense philosophy that granting and withholding privileges is a valuable means of encouraging desirable prisoner conduct. See pp. 2-5, *supra*. Consistent with that general approach, it is entirely rational that, for the worst of the worst inmates, Pennsylvania would deny the privilege of possessing newspapers, magazines, and photographs, until such inmates demonstrate that they are capable of behavioral reform.

b. In concluding that the challenged restrictions on LTSU inmates bear no logical connection to Pennsylvania's asserted interests, the court of appeals focused on Pennsylvania's election to continue LTSU2 confinement until prison officials deem promotion of the inmate to be appropriate, and the resulting fact that the Commonwealth does not spell out exactly when an LTSU2 inmate might earn relaxation of the restrictions. See Pet. App. 11a-12a. That approach is deeply flawed and unduly constrains the discretion of prison officials concerning the precise contours of a disciplinary scheme.

As an initial matter, the court of appeals' approach cannot be squared with this Court's decision in *Overton*. The prohibition in that case against visitation privileges for inmates with multiple substance-abuse infractions was imposed for a minimum period of two years, after which an inmate could apply for restoration of visitation privileges at the discretion of the warden. See 539 U.S. at 130. In upholding that restriction, the Court specifically rejected the argument that it bore no rational connection to the asserted governmental interests because restoration of visitation was "not automatic even at the end of two years." *Id.* at 134. The Court "agree[d] the restriction is severe," but concluded that its severity and indefinite duration did not warrants its invalidation "in all instances." *Ibid.* This case, like *Overton*, involves a categorical challenge to the validity of the challenged restrictions brought on behalf of all LTSU2 inmates. And just as in *Overton*, the uncertain duration of the restrictions with respect to any particular inmate, and the discretion accorded prison officials in that regard, affords no basis for invalidating the restrictions as a categorical matter.[8]

Moreover, the court of appeals erred in concluding that the uncertain duration of LTSU2 confinement renders the challenged restrictions "illogical" and incapable of deterring inmate misconduct. Pet. App. 12a. The court's reasoning would apply to all privileges denied to LTSU2 inmates—not just the bar against possession of newspapers, magazines, and photographs—and it is unsound in several respects. First, the

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[8] The Court suggested in *Overton* that, if it were confronted with evidence in a subsequent as-applied challenge that the visitation restriction were "treated as a *de facto* permanent ban on all visitation for certain inmates, [it] might reach a different conclusion in a challenge to a particular application of the regulation." 539 U.S. at 134. Similarly, as Judge Alito observed below, "[a]n as-applied challenge by an inmate subjected to lengthy confinement in Level 2 despite a record of reformed behavior would present different considerations, but the majority's opinion is not limited to such a case." Pet. App. 28a (dissenting opinion).

uncertain duration of LTSU2 confinement does not remove the deterrent effect on inmates who have yet to be transferred into the LTSU. See Pet. App. 27a (Alito, J., dissenting). The challenged restrictions similarly serve as an inducement for those LTSU inmates who have been promoted to LTSU1 status to avoid demotion and re-transfer to LTSU2 confinement. With respect LTSU2 inmates, finally, even if uncertainty about the duration of LTSU2 confinement "may have an impact on the degree of the incentive" to "refrain from disruptive behavior in the hope of obtaining a transfer out of the unit," there "is no reason to *suppose* that the incentive is wholly destroyed," *id.* at 27a-28a (Alito, J., dissenting) (emphasis added), and certainly respondent has not met his burden of *showing* that the incentive is "wholly destroyed."

Accordingly, notwithstanding the uncertain duration of LTSU2 confinement, Pennsylvania prison officials acted well within their discretion in concluding that the challenged restrictions bear a logical connection to the objectives of deterring inmate misconduct and inducing behavioral reform. Uncertainty about the duration of the challenged restrictions in fact is likely to enhance—rather than diminish—the degree to which they serve as a deterrent.[9] Indeed, for the recalcitrant inmates in LTSU2 confinement, as to whom standard methods of discipline have proved unfruitful, withholding privileges for a preset duration may do little more than encourage the inmate to wait out the period.

For those reasons, there is nothing arbitrary or irrational about Pennsylvania's decision to impose the challenged restrictions without also establishing an inflexible, predeter-

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[9] See, *e.g.*, Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 Cardozo L. Rev. 1535, 1581 (2005) ("even risk-preferring individuals —who might be undeterred by normal threats of sanctions—could find uncertainty to be a significant disincentive"); Tom Baker et al., *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 Iowa L. Rev. 443, 445 (2004) ("uncertain sanctions * * * achieve more deterrence than certain sanctions").

mined limitation on the duration of LTSU2 confinement. LTSU2 inmates, by definition, present extraordinary disciplinary problems; indeed, most have found their way to the LTSU because they have failed to respond to standard disciplinary measures including in many cases sanctions of a finite duration. See Br. in Opp. App. 95. It is entirely rational in that context to accord prison officials discretion to continue an inmate's LTSU2 confinement until the officials perceive adequate, individualized indicia of behavioral reform. That is particularly true insofar as promotion from LTSU2 confinement might presage an eventual release to the general inmate population. Cf. *Hewitt* v. *Helms*, 459 U.S. 460, 477 n.9 (1983) ("The decision whether a prisoner remains a security risk will be based on facts relating to a particular prisoner * * * and on the officials' general knowledge of prison conditions and tensions, which are singularly unsuited for 'proof' in any highly structured manner.").[10]

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[10] In addition to relying on the uncertain duration of LTSU2 confinement, the court of appeals also pointed to a perceived lack of clarity concerning the precise forms of misconduct that result in transfer to the LTSU, as well as the precise sorts of behavioral reforms that can result in an LTSU inmate's promotion from LTSU2 status. See Pet. App. 11a. Those perceived uncertainties offer no more basis for invalidating the challenged restrictions than does the uncertainty surrounding the duration of LTSU2 confinement. Moreover, the sound reasons that support Pennsylvania's decision to refrain from imposing an inflexible limitation on the duration of LTSU2 confinement also support preserving the discretion of prison officials to determine, based on individualized assessments, both whether an inmate's misconduct is sufficiently severe to warrant transfer to the LTSU and whether an LTSU2 inmate has reformed his behavior in a manner warranting advancement to LTSU1 status. See *id.* at 3a n.2 (enumerating conduct that can warrant transfer to LTSU); Br. in Opp. App. 26-27 (setting forth considerations that bear on propriety of promotion from LTSU2). The court of appeals also appeared to misperceive the potential grounds for transfer to the LTSU. The court indicated that an inmate could be transferred to the LTSU in the absence of any misconduct infraction at all, see Pet. App. 11a, but the record does not support that understanding. The portion of the deposition testimony cited by the court of appeals indicates that an inmate, in atypical circumstances, might be

c. The court of appeals reasoned that Pennsylvania had failed to accumulate sufficient record proof that the challenged restrictions in fact advance the objectives of deterring misconduct and inducing behavioral reforms. Pet. App. 12a-14a. In the court's view, prison officials were required to demonstrate that their "deprivation theory of behavior modification" has a "basis in real human psychology, or ha[s] proven effective with LTSU inmates." *Id.* at 13a. That analysis is contradicted by this Court's precedents.

Turner does not require a State to amass evidentiary proof to justify its prison rules. *Turner* requires only that prison regulations "logically advance[]" a legitimate penological interest, not that they be empirically proven to have the desired effect. 482 U.S. 93; see *id.* at 91, 93. *Turner* itself illustrates the point. In upholding restrictions on correspondence between inmates in different institutions based on concerns about the possibility of communicating escape plans or coordinating acts of violence, the Court explained that there need only be "a *logical* connection between [those] security concerns * * * and a ban on inmate-to-inmate correspondence," not "a searching examination of the record to determine whether there was sufficient proof that inmate correspondence had actually led to an escape plot, uprising, or gang violence." *Id.* at 93-94 n.*. Indeed, the absence of the need for empirical proof and factual findings is what distinguished the *Turner* standard from strict scrutiny. See *ibid.*[11]

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transferred to the LTSU without first having been assigned to an SMU, not that an inmate could be transferred to the LTSU without any predicate determination of misconduct at all. See Br. in Opp. App. 95.

[11] As the District of Columbia Circuit explained in upholding restrictions on inmates' possession of pornographic publications, "[t]here is, of course, no 'record evidence,' and certainly no sophisticated multiple regression analysis or other social science data, to support [the] belief" that excluding pornography from prisons advances the asserted interest in prisoner rehabilitation. *Amatel*, 156 F.3d at 199. The court did "not think, however, that common sense must be the mere handmaiden of social science data or expert testimonials." *Ibid.* Instead, while "scientific studies can have a corrective effect by establishing an

Because the existence of a rational connection between the challenged restrictions on inmates and the asserted governmental interests is evident as a matter of common sense, respondent bore the burden of disproving the rationality of the restrictions. See *Jones*, 433 U.S. at 127-128 ("Without a showing that [the] beliefs" of prison administrators "were unreasonable, it was error for the District Court to conclude that [they] needed to show more."). As a practical matter, the court of appeals' approach shifted that burden and erroneously placed it on the State. See *Overton*, 539 U.S. at 132; see also *Johnson*, 125 S. Ct. 1146 n.1 & 1151 (rejecting application of *Turner* analysis in race context because burden of proof in considering government's use of race should not be on the inmate). Indeed, the court of appeals accepted, in the absence of any record proof, the common-sense conclusion that various restrictions on the privileges of LTSU2 inmates other than the ones challenged in this case (such as restrictions on visitation, telephone calls, commissary use, compensation, and in-cell educational programs) advance Pennsylvania's "behavior modification goals." Pet. App. 25a. The court had no basis for imposing any different burden with respect to the challenged restrictions on newspapers, magazines, and photographs.[12]

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apparently implausible connection or refuting an apparently obvious one, * * * conformity to commonsensical intuitive judgments is a standard element of both reasonableness and rationality." *Ibid.*; accord *Mauro* v. *Arpaio*, 188 F.3d 1054, 1059-1060 (9th Cir. 1999) (en banc), cert. denied, 529 U.S. 1018 (2000).

[12] Respondent's claim ultimately requires adopting the view that privileges that implicate First Amendment interests are categorically different from other privileges. But that position cannot be sustained either practically or legally. As a practical matter, many of the most desirable privileges—from watching television to receiving visitors—implicate First Amendment interests. And the extension and withdrawal of privileges provide effective incentives precisely because they are desirable. As a legal matter, moreover, this Court has made clear that *Turner* deference is fully applicable to all First Amendment claims, and that deference is particularly appropriate when such privileges are withdrawn as part of an effort to induce compliance with prison rules. See *Overton*, 539 U.S. at 134. The court of appeals speculated that the

Finally, imposing an evidentiary burden on States to prove that a challenged prison regulation advances particular penological objectives would discourage if not prevent States from pursuing "innovative solutions to the intractable problems of prison administration," *Turner*, 482 U.S. at 89, because it would be difficult and costly for prison administrators to amass the necessary data to sustain such a burden. *Turner*'s deferential standard, however, was designed to promote creative approaches to prison administration with full appreciation of the fact that innovative approaches may be needed to address persistent problems— such as encouraging reform among the prison's most incorrigible inmates.

C. The Remaining Considerations Under *Turner* Reinforce The Reasonableness Of The Challenged Restrictions

1. *Turner*'s reasonableness test calls for consideration of three other factors. The first is whether "alternative means of exercising the right" remain available to inmates. *Turner*, 482 U.S. at 90. "Of course if the 'right' at stake is defined in terms of the materials excluded by the ban, any regulation will come up short." *Amatel*, 156 F.3d at 201. The Court thus has emphasized that the right "must be viewed sensibly and expansively." *Abbott*, 490 U.S. at 417. In *O'Lone*, for instance, the Court upheld a regulation even though it eliminated the ability of inmates to attend a weekly Muslim congregational service, reasoning that inmates retained the ability to participate in other Muslim religious exercises. 482

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challenged restrictions "may produce less rather than more compliance in at least some inmates," Pet. App. 14a, a supposition that was based on a handful of statements in judicial opinions generally supporting the abstract notion that "isolating prisoners from the going[s]-on in the outside world tends to undercut any genuine rehabilitation," *id.* at 13a. But *Turner* warns against judges substituting their assessment of proper prison administration for that of prison officials. That admonition cannot be circumvented by relying on the judicial assessments of other judges in earlier reported cases. More fundamentally, that analysis mistakes what is sound prison policy for inmates in general, with the proper way to deal with the most recalcitrant inmates.

U.S. at 351-352. Likewise, in *Overton*, the Court acknowledged that the complete ban on visitation for repeat offenders eliminated any alternative form of visitation, but nonetheless emphasized that the inmates "may communicate with people outside the prison by letter and telephone." 539 U.S. at 135.

The need to view the right at stake "sensibly and expansively" is particularly manifest in the circumstances of this case, as the entire object of the challenged restrictions is to deny access to newspapers, magazines, and photographs, in order to deter misconduct and induce behavioral reform. Because the very purpose of the restrictions is to deny a privilege as a means of inducing good behavior, the most straightforward "alternative means of exercising the right," *Turner*, 482 U.S. at 90, is the inmate's ability to avoid the sanction by complying with prison rules and to earn reinstatement of the privilege by demonstrating modified behavior. In *Overton*, the Court accordingly upheld the prohibition against visitation for multiple substance-abuse violators despite the lack of any means of obtaining visitation other than persuading the warden to reinstate the privilege as a matter of discretion. See 539 U.S. at 130, 134-135.[13]

In addition, LTSU2 inmates are not denied all forms of expressive materials. See *Turner*, 482 U.S. at 92 (upholding restrictions on inmate-to-inmate correspondence that did "not

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[13] The court of appeals suggested that there was insufficient record evidence documenting the precise process by which an inmate could obtain promotion from LTSU2 confinement and a resulting reinstatement of newspaper and magazine privileges. See Pet. App. 20a-21a. This case, however, has been litigated by respondent as a facial challenge, not an as-applied challenge in which a particular inmate contends that he has been unfairly denied promotion under facially valid rules. With respect to the facial validity of the restrictions, the record contains the rules setting forth the criteria by which prison officials decide whether promotion from LTSU2 confinement is warranted, see Br. in Opp. App. 26-27, and also contains deposition testimony about the availability of promotion, *id.* at 110. That testimony indicates that some inmates have been promoted from LTSU2 to LTSU1 status, and that some inmates have advanced out of the LTSU altogether. *Id.* at 93-95.

deprive prisoners of all means of expression"). LTSU2 inmates may retain books in their cells, and also have no special restrictions on their receipt of personal correspondence. See Pet. App. 47a. Respondent suggests that LTSU2 inmates nonetheless are denied the ability to keep abreast of "current political, social, and other public events." Br. in Opp. 5. A narrow focus on publications about current events, however, is not a "sensibl[e] and "expansive[]" understanding of the right at stake. *Abbott*, 490 U.S. at 417. At any rate, the restrictions do not prevent LTSU2 inmates from learning about current events through personal correspondence, or through their limited personal visits.

2. The remaining considerations under *Turner* are: (i) the impact on prison personnel, other inmates, and institutional resources, of accommodating the interest of LTSU2 inmates in possessing newspapers, magazines, and photographs; and (ii) the availability of "ready alternatives" to the challenged restrictions. *Turner*, 482 U.S. at 90. Cf. *O'Lone*, 482 U.S. at 352-353 (examining the two considerations together). With respect to the impact on prison personnel and other inmates, the challenged restrictions aim to deter extreme conduct of the kind that warrants transfer to the LTSU, and to induce behavioral reforms in the most unruly inmates. The restrictions thus are grounded in concerns about protecting the safety of prison personnel and other inmates. See *Turner*, 482 U.S. at 92 (deferring to judgment of prison officials that relaxing restrictions on inmate-to-inmate correspondence would threaten safety of "guards and other prisoners alike").

With respect to the availability of ready alternatives and the effect on institutional resources, the Court has emphasized that "*Turner* does not impose a least-restrictive alternative test, but asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal." *Overton*, 539 U.S. at 136. The court of appeals proposed two alternative policies in place

of the one adopted by prison administrators. The first contemplates establishing a prescribed "reading period" during which corrections officers could bring a newspaper or magazine to an inmate's cell, and the second envisions officers escorting inmates to the secure LTSU library to read a newspaper or magazine. Pet. App. 22a-23a. Each of those alternatives would nullify the basic object of the restrictions by partially restoring the denied privileges without any demonstration of improved behavior on the part of LTSU2 inmates. For that reason alone, the court's preferred alternatives cannot be said to impose "so little cost to penological goals that they meet *Turner*'s high standard." *Overton*, 539 U.S. at 136.

The proposed alternatives also would impose potentially significant costs on prison resources by diverting corrections officers from other essential duties, either to facilitate escorting of each LTSU2 inmate to the designated reading area, or to permit delivering the materials to (and retrieving them from) each LTSU2 inmate's cell. See Pet. App. 29a (Alito, J., dissenting); see also *Abbott*, 490 U.S. at 419 (noting that "administrative inconvenience of [the] proposed alternative is also a factor to be considered"). The diversion of corrections officers raises particular concerns in the potentially volatile setting of the LTSU, which houses Pennsylvania's most dangerous inmates. In the LTSU, two officers must be on hand to escort any inmate for any permissible activity outside of his cell, including showers, exercise, disciplinary proceedings, and the like. Pulling officers away from those responsibilities to supervise inmate trips to a recreational "reading room" or to serve as librarians ferrying reading materials to and from inmates' cells would unduly interfere with the significant demands of securing the LTSU. For those reasons, the alternatives proposed by the court of appeals in no sense constitute "obvious, easy alternatives" to the policy chosen by Pennsylvania prison officials for dealing with the State's most dangerous and recalcitrant inmates. *Turner*, 482 U.S. at 90.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JEFFREY A. BEARD, SECRETARY,
PENNSYLVANIA DEPARTMENT OF CORRECTIONS,

Petitioner,

—v.—

RONALD BANKS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF PENNSYLVANIA, THE LEGAL AID SOCIETY, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AMERICAN FRIENDS SERVICE COMMITTEE, AND CALIFORNIA PRISON FOCUS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

The statements of interest of the *amici curiae* are set forth in the Appendix.

STATEMENT OF THE CASE

Opened in April 2000, the Long Term Segregation Unit (LTSU) at SCI-Pittsburgh is designed to make life as unpleasant as possible for those prisoners who are deemed incorrigible and recalcitrant by prison administrators. Respondents are a class of all "current and future [Level] 2 Long Term Segregation inmates." J.A. 3.

Respondents are subject to nearly total isolation and idleness. They are locked in their cells for all but one hour each day, and are prohibited from purchasing commissary items and engaging in educational activities, group religious services and prison jobs. J.A. 32-33, 38, 100, 102. Human contact is limited to a few prison employees, legal counsel and once-a-month, one hour, weekday visits from immediate family members. J.A. 48, 98. Telephone calls are permitted only in emergencies. J.A. 48, 102.

Respondents are isolated not only from other people, but also from current thoughts and ideas. The challenged policy prohibits Respondents from receiving or reading all non-religious newspapers, magazines and articles cut out of newspapers and magazines, unless the article relates to the prisoner or a family member. J.A. 48, 91, 102. Respondents are also prohibited from ordering books, watching television

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[1] No counsel for any party authored any part of this brief. No persons or entities other than the amici curiae made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with the Court.

and listening to the radio. J.A. 102. As a result, they are completely cut off from public affairs and other current political, social, moral, aesthetic and educational news and commentary.

Respondent Ronald Banks filed a lawsuit under 42 U.S.C. § 1983, challenging Petitioner's ban on newspapers and magazines as a First Amendment violation. The United States District Court for the Western District of Pennsylvania granted Banks' motion for class certification, but later denied Respondents' motion for summary judgment and granted Petitioner's, concluding that Petitioner's asserted interests in security and rehabilitation were reasonably related to the ban, under *Turner v. Safley*, 482 U.S. 78 (1987). The Court of Appeals for the Third Circuit reversed the order granting Petitioner's motion for summary judgment and remanded for further proceedings. *Banks v. Beard*, 399 F.3d 134 (3d Cir. 2005). The court concluded that Petitioner was not entitled to judgment as a matter of law under *Turner*, with respect to either a security or rehabilitation rationale.

The Third Circuit denied Beard's petition for rehearing *en banc*, and this Court granted *certiorari*.

SUMMARY OF THE ARGUMENT

In *Turner v. Safley*, 482 U.S. 78 (1987), this Court set forth a multi-factor test for evaluating many, but not all, constitutional claims brought by prisoners. As the Court has subsequently explained, *Turner* establishes a deferential standard of review that is most appropriate when considering "regulations that are centrally concerned with the maintenance of order and security." *Thornburgh v. Abbott*, 490 U.S. 401, 409-10 (1989). In addition, the Court has applied *Turner* deference when it has concluded that the rights asserted by prisoner plaintiffs are inconsistent with the fact of incarceration. *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003).

This case fits neither category. The "primary"

justification for the challenged publication ban is not security but general deterrence or what Petitioner has described as "behavior modification," an amorphous, ill-defined and potentially boundless interest. Conversely, the right asserted by Respondents – reading news and commentary – is entirely consistent with their status as prisoners and, if anything, assists their eventual reentry to society by allowing them to remain informed citizens.

Amici are aware of no decision, from this Court or any other court, that has ever sustained such a sweeping restriction of prisoners' First Amendment rights. Nor has this Court ever approved a challenged prison restriction based solely on such a potentially limitless rationale as general deterrence. Although Petitioner argues that a ruling in his favor involves no more than an application of well-settled principles, Petitioner's construction of *Turner* has no logical stopping point. If his arguments are accepted, there will be nothing left of the First Amendment for prisoners because any restriction on prisoner rights, whether it applies only to "recalcitrant" prisoners or to prisoners in general population, could be justified on the ground of general deterrence. Only the Eighth Amendment will remain as a potential substantive limit on deprivations imposed on prisoners.

These factors strongly counsel against applying *Turner* and argue instead for requiring "a closer fit," *Thornburgh*, 490 U.S. at 412, between Petitioner's asserted interest and the means employed to further it. Alternatively, if the Court determines that *Turner* provides the appropriate standard, it is critical that the Court conduct a searching inquiry under *Turner* into whether Petitioner's policy constitutes an "exaggerated response" to the state's asserted interests. Petitioner can only prevail if *Turner* is "toothless," and this Court has clearly held that it is not. *Thornburgh*, 490 U.S. at 414.

ARGUMENT

I. *TURNER* DEFERENCE IS INAPPROPRIATE ON THE FACTS OF THIS CASE

Although there is language in this Court's opinions suggesting that *Turner* is a "unitary" standard, *Shaw v. Murphy*, 532 U.S. 223, 229 (2001), and that it "applies to all circumstances in which the needs of prison administration implicate constitutional rights," *Washington v. Harper*, 494 U.S. 210, 224 (1990), the Court's actual practice has been more nuanced. Just last Term, the Court declined to apply *Turner* when reviewing a claim of racial segregation. *Johnson v. California*, 543 U.S. 499, 509-510 (2005). The Court has also recognized that the interests asserted by the government are necessarily relevant in determining whether *Turner* applies. *Thornburgh*, 490 U.S. at 412.

In this case, the Court should hold that *Turner* is inapplicable for several reasons. First, Petitioner's interest in general deterrence does not implicate security or other core needs of "running a prison," *Turner*, 482 U.S. at 84. Second, the right to read news and commentary is not only consistent with incarceration, it is a critical means by which prisoners maintain their status as citizens. Third, given the amorphous and boundless nature of Petitioner's deterrence interest, any reliance on *Turner*'s deferential standard threatens the continuing viability of the First Amendment in the prison context. Accordingly, the Court should require "a closer fit," *Thornburgh*, 490 U.S. at 412, between Petitioner's means and ends. *E.g.*, *Procunier v. Martinez*, 416 U.S. 396, 414 (1974) (requiring prison officials to show that regulation is "generally necessary to protect . . . legitimate government interests").

Because *amici* do not believe the challenged policy can survive *Turner* scrutiny, *see* Part II, *infra*, it plainly cannot survive the more exacting scrutiny that is required if *Turner* does not apply.

A. An amorphous interest in general deterrence is not entitled to *Turner* deference

"Behavior modification" is the "primary reason" asserted by Petitioner as justification for his policy prohibiting Respondents from reading all non-religious newspapers and magazines.[2] J.A. 197. *See also* Br. for Pet. at 4. Petitioner asserts a "hope" that making life as unpleasant as possible will both force Respondents to improve their behavior and deter others from misbehaving. *Banks*, 399 F.3d at 142. Such a boundless and ill-defined goal should be rejected as illegitimate where it is used as an excuse to limit First Amendment rights. At the very least, Petitioner's interest should be assessed under heightened scrutiny.

Petitioner characterizes his interest as one of "rehabilitation," which the Court has recognized as legitimate, although never as the sole justification for a restriction. *E.g.*, *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 351 (1987). However, Petitioner's attempt to shoehorn his policy into the box of

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[2] In the courts below, Petitioner asserted two justifications for his policy, an interest in "rehabilitation," which *amici* suggest is more accurately characterized as "general deterrence" or "behavior modification," and an interest in "security," specifically, the potential danger caused by allowing Respondents to handle periodicals. This brief does not focus on Petitioner's security interest, which the Court of Appeals correctly found is not reasonably related to the ban on newspapers and magazines. As stated in the court's opinion, the policy is an "exaggerated response" to any security concerns. *Banks*, 399 F.3d at 146-47. One obvious alternative would be to limit the number of newspapers and magazines that Respondents may keep in their cell and take them away from those who abuse them. Because Petitioner already allows Respondents to keep up to "one records box of religious materials," J.A. 178, there would be no cost to extending this policy to other publications.

"rehabilitation" is inconsistent with common sense and this Court's and other courts' understanding of the term.

The ordinary meaning of "rehabilitation" is preparation for release back into society. *See McKune v. Lile*, 536 U.S. 24, 36 (2002) (plurality opinion) (noting that rehabilitation is objective of corrections system because "most offenders will eventually return to society"). In a constitutional democracy, however, any conception of rehabilitation must include allowing prisoners to become or remain informed and engaged citizens. Petitioner's policy has precisely the opposite effect

To the extent that deprivation is used as a means of rehabilitation, there is generally a specific goal targeting specific behavior, often related to the prisoner's conviction. *E.g., McKune*, 536 U.S. at 30; *King v. Fed. Bureau of Prisons*, 415 F.3d 634, 639 (7th Cir. 2005) (Posner, J.). Here, Petitioner's interest in "rehabilitation" is vague at best, which by itself should heighten the Court's skepticism of its legitimacy. Petitioner is not targeting behavior related to Respondents' convictions – he is not targeting any specific behavior at all. Moreover, the conduct he is prohibiting is unrelated to Petitioner's determination that Respondents are "recalcitrant and incorrigible," Br. for Pet. at 4, as there is nothing in the record to suggest that a significant number of Respondents have abused newspapers or magazines in the past or were transferred to the LTSU because of such conduct.

Although Petitioner claims that the ban on newspapers and magazines is not intended to suppress expression, that is undoubtedly its effect. And at least on some level, that is Petitioner's purpose: he censors nearly all incoming publications primarily because he believes that doing so will make life more miserable for Respondents. Under such circumstances, it becomes difficult to distinguish Petitioner's motives from those the Court has condemned in the past, particularly where Petitioner has so many other ways to modify Respondents' behavior, including withdrawing privileges that do not

implicate First Amendment rights. *See Romer v. Evans*, 517 U.S. 620, 635 (1996) (concluding that law was motivated by animus in part because it inflicted "immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it").[3]

However, even assuming that Petitioner's general interest in deterrence is legitimate on its face, it is not entitled to *Turner* deference. This Court has never afforded that level of deference to such an interest, but rather has consistently identified security as the most important goal of a prison and the interest that is most entitled to deference. *E.g., Pell v. Procunier*, 417 U.S. 817, 823 (1974) ("[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."). In fact, in *every* case in which the Court has upheld a prison policy against a First Amendment challenge, the Court has emphasized the detrimental impact that the behavior could have on safety, order or security. *E.g., Shaw*, 532 U.S. at 231; *Thornburgh*, 490 U.S. at 416-17; *O'Lone*, 482 U.S. at 350-51; *Turner*, 482 U.S. at 91-92; *Bell v. Wolfish*, 441 U.S. 520, 550 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132-33 (1977); *Pell*, 417 U.S. at 827.

These cases show that determining the appropriate standard of review is closely tied to the nature of the risk involved in the event of an erroneous decision. Government actors need greatest discretion where limiting it could have serious consequences for personal safety. But where giving greater protection to constitutional rights does not entail a

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[3] *See also Spellman v. Hopper*, 95 F.Supp.2d 1267, 1281 (M.D. Ala. 1999) (stating that it is "questionable" whether it is legitimate interest to punish prisoners "for being problem inmates in general"), *Guajardo v. Estelle*, 568 F. Supp. 1354, 1366 (S.D. Tex. 1983) (holding that prison officials "may not infringe upon first amendment rights of an inmate in solitary confinement solely to enhance the punishment")

credible risk of harm, the need for deference is diminished significantly, and a heightened standard of review is appropriate.

Thornburgh provides support for this approach. In that case, the Court explained that it had departed from the heightened scrutiny of *Martinez* in later cases, such as *Turner*, because "such a strict standard simply was not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security." *Thornburgh*, 490 U.S. at 409-10. In *Martinez*, less deference was appropriate because the outgoing correspondence at issue did not "pose a serious threat to prison order and security." *Thornburgh*, 490 U.S. at 411. More generally, *Thornburgh* makes clear that where the government's asserted interest does not require the same degree of discretion as a security interest, "*a closer fit between the regulation and the purpose it serves may safely be required*." 490 U.S. at 412 (emphasis added). Because in this case neither the form nor the content of the banned materials implicate security, the Court should require a "closer fit" between the publications ban and Petitioner's asserted interest in deterrence.

More fundamentally, applying *Turner* to Petitioner's general deterrence interest is simply incompatible with *Turner*'s four-factor test, at least as Petitioner seeks to apply it. As pointed out by Judge Tatel in *Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228, 239-40 (D.C. Cir. 2003) (Tatel, J., concurring in part and dissenting in part), evaluating a prison's interest in general deterrence under *Turner* is a nonsensical exercise if the government's assertions are taken at face value. In this case, if one accepts Petitioner's theory that depriving prisoners of constitutional rights will improve behavior, there can be no "exaggerated response" to any policy enacted to further this interest because the more severe the restriction, the more likely it will deter. Any accommodation of the prisoner's First Amendment rights, no matter how easily and inexpen-

sively implemented, could undercut that interest.

Petitioner's argument has no stopping point, because all prison policies that restrict constitutional rights could be defended on the basis of deterrence. Although Petitioner claims that Respondents represent the "worst of the worst" prisoners, constitutional deprivations imposed on prisoners in general population equally could be justified as intended to make the prison sufficiently miserable so as to deter both prisoners (from reoffending after release) and those outside the prison (from committing their own crimes). *See, e.g., Kimberlin v. U.S. Dep't of Justice*, 150 F.Supp.2d 36, 45 (D.D.C. 2001) (upholding ban on musical instruments for general population prisoners on ground of deterrence, "[t]hat is, prisons should be seen as a terrible place to effectively deter crime"), *aff'd on other grounds*, 318 F.3d 228 (D.C. Cir. 2003). A belief that harsh conditions will deter misconduct may actually be *more* rational with respect to non-prisoners and prisoners in general population than those prisoners who are "incorrigible and recalcitrant." Certainly, the regulations struck down in *Turner* and *Martinez* could be quickly revived and justified on deterrence grounds just as easily as Petitioner's publication ban. Marriage and correspondence would be at least as powerful as newspapers and magazines as "incentives" in any attempt to modify behavior.

Applying *Turner* deference to a policy based on a general interest in deterrence not only undermines *Turner*, but also provides an extraordinary incentive for prison officials to enact the harshest restrictions. Under Petitioner's theory, the more miserable a restriction makes life for prisoners, the more likely it will deter, and therefore, the more likely it will be upheld as "reasonably related" to deterrence. *See* Br. for Pet. at 31 (arguing that "diminish[ing] the severity" of restriction will "diminis[h] its value . . . as a deterrent"); Br. for U.S. at 22 (arguing that potential long duration of deprivation enhances its deterrent effect); Br. for Council of State Governments at

18 (arguing that burden on right must be significant or it will have no deterrent effect). The Court can avoid this self-justifying result by either concluding that Petitioner may not deprive Respondents of First Amendment rights as a way to deter general misconduct or declining to apply *Turner* deference to Petitioner's interest in behavior modification.

B. The nature of Respondents' asserted right supports a heightened standard of review

Just last Term, the Court made clear that it may depart from *Turner* depending on the right at stake: "[W]e have applied *Turner*'s reasonable-relationship test *only* to rights that are inconsistent with proper incarceration." *Johnson*, 543 U.S. at 510 (emphasis in original) (internal quotation marks omitted). In upholding restrictions, the Court has similarly emphasized the extent to which the asserted right was fundamentally inconsistent with incarceration. For example, in *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003), the Court upheld restrictions on prisoner visitation while noting that "freedom of association is among the rights least compatible with incarceration." *See also Jones*, 433 U.S. at 126. Thus, in determining whether *Turner* should apply to a particular regulation, the question is whether the right at issue is one "that need necessarily be compromised for the sake of proper prison administration." *Johnson*, 543 U.S. at 510.

The Court did apply *Turner* in *Thornburgh*, which involved restrictions on incoming publications. But in that case, there was a fundamental incompatibility between the restricted conduct – reading material that was "detrimental to security" – and the operational needs of the prison. *Thornburgh*, 490 U.S. at 415. *See supra* Part I.A. The nature of the deprivation was also different, as it only minimally limited the information prisoners could seek out.

Here, Petitioner's policy attempts to cut off Respon-

dents from all information about the outside world, which prevents them from being informed and engaged citizens. As the Court observed in *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), "speech concerning public affairs is more than self-expression; it is the essence of self-government." *See also Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (noting that "informed public opinion is the most potent of all restraints upon misgovernment"). To deny prisoners all traditional outlets for learning about political affairs and other news is to deny their very citizenship -- *i.e.*, to say that because they are deemed "recalcitrant," their knowledge and understanding on matters of public affairs no longer matter.[4]

This Court made clear long ago that citizenship is not something that a prisoner forfeits upon incarceration. *See Trop*

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[4] In *Shaw*, 532 U.S. at 230, the Court stated, "the *Turner* test, by its terms, simply does not accommodate valuations of content." However, the question before the Court in *Shaw* was not whether the nature of the right is relevant, but whether First Amendment claims by "jailhouse lawyers" should be given heightened protection. *Id.* at 225. The Court declined to do so, at least in part because of the significant security problems granting such heightened protection would cause. *Id.* at 231 ("[E]ven if we were to consider giving special protection to particular kinds of speech based upon content, we would not do so for speech that includes legal advice," noting that prisoners often abuse legal assistance programs to pass contraband or communicate instructions regarding unlawful behavior). Simply granting prisoners some access to the news does not implicate the security concerns that were present in *Shaw*.

Further, as noted, the Court *has* considered the right at issue in particular cases, at least the extent to which the right is inconsistent with incarceration. *E.g.*, *Overton*, 539 U.S. at 131. Thus, *amici* respectfully request that the Court reconsider its broad statement in *Shaw* for a more context-sensitive approach. *See Central Virginia Community College v. Katz*, – U.S. –, 126 S. Ct. 990, 996 (2006) ("we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated"). To the extent that the Court concludes that *Turner* is incompatible with such an approach, this provides a further argument why the Court should not apply *Turner* in this case.

v. Dulles, 356 U.S. 86, 101 (1958) (holding that denationalization as punishment for crime violates Constitution in part because it "strips the citizen of his status in the national and international political community"). *See also Overton*, 539 U.S. at 138 (Stevens, J., concurring) ("'a criminal conviction . . . do[es] not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual'") (citation omitted). To the contrary, in a free society, any goal of rehabilitation must allow room for a prisoner to become educated about the affairs of his own country and the world in which he lives. Thus, like the right to equal treatment considered in *Johnson*, allowing prisoners to remain informed "is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system." 543 U.S. at 511.[5]

It is entirely appropriate to consider the nature of the speech being suppressed in deciding what standard of review to apply. The Court has done so in various other contexts, even those in which it usually affords greater deference because of concerns about the operation of government. *E.g.*, *Connick v. Myers*, 461 U.S. 138, 152 (1983) (government may need a "stronger showing" of disruption to justify discipline of employee "if the employee's speech more substantially involved matters of public concern"). It is also likely that the nature of the speech at issue was a concern of the Court in *Martinez*, 416 U.S. at 415-16, in striking down a policy that censored statements by prisoners that "unduly complain," "magnify grievances," or express "inflammatory political, racial, religious or other views." Although one could plausibly

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[5] It scarcely needs mentioning that the policy restricts not only the rights of prisoners but also of any member of the press seeking to communicate with them. *Thornburgh*, 490 U.S. at 408 ("publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners").

believe that these kinds of statements could undermine prison security (whether included in incoming or outgoing mail), a stronger evidentiary showing was necessary because it is simply antithetical to the First Amendment to censor criticism of the government. It is similarly antithetical to free speech values to force ignorance and apathy on *any* segment of society, as Petitioner has done in this case.

Even if one accepts that the censorship in this case is incidental rather than purposeful, failing to give adequate consideration to the right at issue in this case will give prison officials carte blanche to act as censors in the future. Under the guise of "behavior modification," they may prohibit any form of speech they disfavor. Such censorship would still be "neutral" under *Turner* so long as the government could articulate a reason for believing that censoring the speech provided some "incentive" to better behavior. *See Thornburgh*, 490 U.S. at 415 (stating that prison regulation is "neutral" if it furthers interest "unrelated to the suppression of expression"). For example, would it not be reasonable to believe under Petitioner's logic that recalcitrant prisoners would be deterred by a policy that forbade them from complaining about prison conditions or from filing litigation challenging those conditions or their criminal convictions? *See Lewis v. Casey*, 518 U.S. 343, 361-62 (1996) (applying *Turner* standard to claim about court access). Certainly, these are forms of speech that prisoners consider to be very important and withdrawing their ability to engage in them would make their lives more miserable. The First Amendment could not tolerate such a ban and it cannot tolerate Petitioner's.

Both the nature of Petitioner's asserted interest and Respondents' asserted right require that there be a "closer fit" between the asserted interest in deterrence and the restriction imposed. Whether the Court applies a standard akin to *Martinez*, 416 U.S. at 414, requiring the government to show that its policy is "generally necessary" to further a legitimate

interest, or even a minimally heightened standard of review, this policy would certainly fail. Petitioner has provided absolutely no support for the propositions that depriving Respondents of newspapers and magazines will improve their behavior and that using any number of other approaches for behavior modification would not be at least as effective. Rather, Petitioner's only hope in this case is that the Court will simply afford unquestioning deference to his unsupported allegations.

II. EVEN UNDER *TURNER*, PETITIONER'S POLICY IS AN "EXAGGERATED RESPONSE"

If the Court does apply the test of *Turner v. Safley*, 482 U.S. 78 (1987), it should nevertheless affirm the Court of Appeals' decision. Part of the merit of the *Turner* test is its "express flexibility." *Thornburgh*, 490 U.S. at 414. Such flexibility–in particular, sensitivity to context– is essential if the Court applies *Turner* to all prison First Amendment challenges. This is especially true when the asserted interest is general deterrence. Because that rationale is potentially boundless, the Court must weigh each of the four factors carefully, lest prisoners' First Amendment rights be completely eradicated.

Turner itself illustrates this point. There, the Court upheld a restriction on prisoner correspondence while striking down a restriction on prisoner marriage. It certainly could be (and was) argued that it was "rational" for the government to believe that prisoner marriages would lead to problematic "love triangles" and would encourage dependency among some prisoners. The Court nevertheless concluded that the marriage restriction was an exaggerated response to the government's expressed concerns, despite the dissent's observations that the test would require that the marriage regulation be sustained if it were applied in the same manner as it had been to the ban on prisoner correspondence. *See*

Turner, 482 U.S. at 112-13 (Stevens, J., dissenting). However, these seemingly disparate results can be explained easily if one recognizes that application of *Turner* is sensitive to context, including the interest asserted by the government, the right claimed by the prisoner, and the severity of the deprivation of the right. Each of these factors demonstrates that Petitioner's policy is an exaggerated response to his stated concerns.

A. Banning all news and commentary is not logically connected with Petitioner's asserted interest in deterrence

Under the first *Turner* factor, a prison policy must have a valid, logical connection with a legitimate penological interest. 482 U.S. at 89. For the reasons discussed in Part I, *supra*, the Court should conclude that the attempt to modify prisoners' behavior by depriving them of information necessary to preserve their status as citizens is not a legitimate penological goal. However, even assuming that an interest in general deterrence is valid in this context, there is simply no logical connection between an interest in general deterrence and a denial of all news and commentary.

1. *The Court of Appeals did not err in evaluating the evidence*

Petitioner contends that the Court of Appeals imposed a "hostile scrutiny" on his policy, focusing primarily on the Third Circuit's consideration of the evidence that the parties presented to the district court. Br. for Pet. at 22-23, 27. In arguing that the court erred, Petitioner relies almost entirely on one sentence in *Overton*, 539 U.S. at 132: "The burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." Petitioner, however, interprets this statement far too broadly. Even in non-prisoner cases, the ultimate burden is almost always on the party contending that

the regulation or statute is unconstitutional. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 17 (1988). But that does not mean that the government is completely relieved of all obligation to justify its decisions. Further, under *Turner*, the Court has assumed that the government has some burden to justify its actions, because the Court has never considered a rationale for a policy unless it was actually advanced by the government, unlike cases in which the Court has applied a rational basis analysis. *See Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001) (stating that, under rational basis review, challenging party has burden to negate "any reasonably conceivable state of facts that could provide a rational basis for the classification") (internal quotation marks omitted).

In practice, this Court has in many cases evaluated the evidence presented by the government. In *Turner*, 482 U.S. at 98, the Court found that the marriage restriction was an exaggerated response to security objectives, in part because the government's position was not supported by evidence. And in *O'Lone*, 482 U.S. at 345-46, 350-51, the Court carefully explained the long history of security problems that prevented officials from allowing prisoners to attend specific religious services. *See also Harper*, 494 U.S. at 226 & n.9 (citing evidence that "proper use of [anti-psychotic] drugs is one of the most effective means of treating and controlling a mental illness likely to cause violent behavior"); *Johnson*, 543 U.S. at 525-527 (Thomas, J., dissenting) (applying *Turner* and discussing evidence adduced by state that racial segregation is required by prison gang violence). Further, the circuits are in agreement that, at least in some circumstances, prison officials must come forward with evidence showing the connection between their interest and the restriction. *See King*, 415 F.3d at 639 (Posner, J.) ("the government must present some evidence to show that the restriction is justified"). *Accord*

Ashker v. California Dep't of Corrections, 350 F.3d 917, 922-23 (9th Cir. 2003); *Beerheide v. Suthers*, 286 F.3d 1179, 1189 (10th Cir. 2002); *Davis v. Norris*, 249 F.3d 800, 801 (8th Cir. 2001); *Flagner v. Wilkinson*, 241 F.3d 475, 486 (6th Cir. 2001); *Morrison v. Garraghty*, 239 F.3d 648, 660-61 (4th Cir. 2001).

Even assuming that it is appropriate to credit a "because we said so" argument by the government where there is a plain and indisputable relationship between the challenged restriction and the governmental interest, that assumption does not apply here for at least three reasons, all of which counsel in favor of requiring some showing that there is an actual fit between means and end.

First, as explained in Part I, Petitioner's behavior modification interest is ill-defined and does not implicate security. When safety is an issue, it is reasonable, even necessary, to allow prison officials to act before a problem arises. *See Turner*, 482 U.S. at 89. In these circumstances, prison officials have not only an interest, but also an obligation to protect those inside the prison, *Harper*, 494 U.S. at 225, and the consequences of an error may be so grave that more leeway should be allowed. *See, e.g.*, *Overton*, 539 U.S. at 129 (explaining security problems associated with increasing levels of visitation and prisoner drug abuse and drug smuggling); *Turner*, 482 U.S. at 91 (noting Missouri's "growing problem with prison gangs").

When the interest asserted is general deterrence, the need for deference to the judgment of prison officials is significantly diminished. No riot will occur if Respondents are allowed to read the news and no contraband will be smuggled into the prison. The most serious consequence will be that the cumulative unpleasantness of life on Level 2 will be reduced by the restoration of a single activity.

Second, there is no obvious link between banning current publications and rehabilitating prisoners. In some

cases, the connection between the interest being asserted and the restriction imposed is so clear that further evidence is simply unnecessary. *E.g.*, *Turner*, 482 U.S. at 91 ("Undoubtedly, communication with other felons is a potential spur to criminal behavior"). The connection between security and the marriage restriction was not so obvious in *Turner*, 482 U.S. at 97-98, and the Court appropriately concluded that more was required from the government than simple rote assertions.

Similarly, in this case, one cannot seriously argue that an obvious connection exists. Common sense does not support a belief that allowing prisoners to read newspapers and magazines will make them "act worse" in some undefined way, particularly when, according to Petitioner, they have already failed to respond appropriately after numerous other privileges were taken away. To the contrary, common sense, scholarship and Pennsylvania's own history suggest that intellectually isolating Respondents will have only a negative impact on their prospects of rehabilitation.[6] Thus, this is

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[6] A recent study by economists at Yale University and the University of Chicago refutes Petitioner's basic premise that imposing harsher conditions on prisoners will improve their behavior. M Keith Chen and Jesse M. Shapiro, *Does Prison Harden Inmates? A Discontinuity-based Approach* (2005), http://www.som.yale.edu/Faculty/keith.chen/papers/prison072405.pdf, at 1 ("We find that harsher prison conditions are associated with significantly more post-release crime"). *See also* Richard Morin, *Time In and Time Out*, Washington Post, Feb. 2, 2006, at A2 (summarizing study's findings). This study only confirms what Petitioner surely already knows through Pennsylvania's own failed and long discredited 19th century practice of attempting to "rehabilitate" prisoners by cutting off all contact with the outside world. Harry Elmer Barnes, *Evolution of Penology in Pennsylvania* (1968), 290-302; David J. Rothman, *Perfecting the Prison, in* Oxford History of the Prison, (Morris & Rothman, eds 1995), 111-29. *See also In Re Medley*, 134 U.S. 160, 168 (1890) (noting that "experience demonstrated . . . serious objections" to "complete isolation of [a] prisoner from all human society," including failure to "recover sufficient mental activity to be of any subsequent service to the community").

precisely the type of case in which prison officials can properly be required to come forward with evidence that their interests are being furthered by the practice at issue.

Finally, as explained below, Petitioner's position on the remaining *Turner* factors is extremely weak. The nature of multifactor tests means that the showing required for one factor depends on the relative strength of the others. For example, in *O'Lone*, there were severe security risks in allowing Muslim prisoners to attend Jumu'ah, risks which could not be diminished through lesser restrictions. 482 U.S. at 351 (noting that it would be "extraordinarily difficult" for officials to allow prisoners to attend service). Because the first, third and fourth factors favored the prison officials so strongly, the harsh nature of the restriction was not dispositive. In this case, where the restriction on the right is severe and the right can be easily accommodated without a significant impact on security or resources, it is proper to require a stronger showing from the government than just a "hope" that the restriction actually accomplishes its goal.

2. *Even if Petitioner was not required to adduce evidence, the policy is not logically connected to a legitimate penological interest*

Under any reasonable view of the facts, it is evident that "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. Common sense simply does not establish that prohibiting Respondents from reading news and commentary will somehow aid in their "rehabilitation." Long ago, both this Court and the Federal Bureau of Prisons recognized that rehabilitation of a prisoner is helped, not hindered, by maintaining communication with the outside world. *Martinez*, 416 U.S. at 412 & n.13 (citing BOP Policy

Statement).

Numerous other courts have similarly recognized the rehabilitative effects that reading has on prisoners and the harm that is caused by its deprivation. *Clement v. California Dep't of Corrections*, 220 F.Supp.2d 1098, 1110 (N.D. Cal. 2002), *aff'd*, 364 F.3d 1148 (9th Cir. 2004); *Morrison v. Hall*, 261 F.3d 896, 904 n.7 (9th Cir. 2001); *Spellman*, 95 F.Supp.2d at 1281; *Knecht v. Collins*, 903 F. Supp. 1193, 1200 (S.D. Ohio 1995), *rev'd on other grounds*, 187 F.3d 636 (6th Cir. June 15, 1999) (unpublished table decision); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1034, 1036 (2d Cir. 1985). The few courts that have ruled on similar publication restrictions agree: there is no logical connection between a total ban on publications and improving prisoner behavior. *Jacklovich v. Simmons*, 392 F.3d 420, 429 (10th Cir. 2004); *Spellman*, 95 F.Supp.2d at 1281. *No* court has upheld a publication ban as restrictive as Petitioner's.[7]

It is particularly nonsensical to believe that the prisoners at issue in this case will improve their behavior as a result of a newspaper and magazine ban. By Petitioner's own assertion, Respondents are "recalcitrant and incorrigible:" most of these prisoners have already "flunked out" of other "level" programs that rely on deprivations of privileges to modify behavior. Br. for Pet. at 4. If Petitioner had no effect (or perhaps a deleterious effect) on Respondents' behavior by placing them in segregation and severely restricting their exercise, visitation, property and numerous other privileges (J.A. 90-102), there is no rational basis to believe that the

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[7] Those few courts upholding publication bans under a deterrence rationale have emphasized the limited duration of those bans, which never exceeded 60 days and which required that the prisoner receive all withheld publications following the period of confinement. *Little v. Norris*, 787 F.2d 1241, 1243-44 (8th Cir. 1986); *Daigre v. Maggio*, 719 F.2d 1310, 1313 (5th Cir. 1983); *Gregory v. Auger*, 768 F.2d 287, 290 (8th Cir. 1985); *Guajardo*, 568 F. Supp. at 1366.

additional deprivation of magazines and newspapers will be more successful. Certainly, this belief is no more "rational" than the government's belief in *Turner* that restricting marriage rights of prisoners would help prevent "love triangles" and discourage prisoners from forming overly dependent relationships.

Policy in other prisons confirms the questionable logic of the newspaper and magazine ban. *See Martinez*, 416 U.S. at 414 n.14 ("policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction"); *Overton*, 539 U.S. at 134 (noting that "numerous other States have implemented similar restrictions on visitation privileges"). As noted by the Court of Appeals, no other segregated prisoners in Pennsylvania are completely denied newspapers and magazines, even those on death row. *Banks*, 399 F.3d at 143. Further, it appears that the vast majority of other states do not impose restrictions that are similar to the one at issue here. *Corrections Compendium*, High Level Security Inmates, September 2003, at tbl. 4 (surveying 37 states and 4 Canadian prison systems; only 3 limited reading of high security prisoners to books only); *see also Jacklovich*, 392 F.3d at 428 (citing expert report of former Secretary of Kansas Department of Corrections that bans on publications are rare).

As a matter of general policy, the Bureau of Prisons also does not ban newspapers and magazines. *See* 28 C.F.R. § 541.12 (stating that prisoners "have the *right* to a wide range of reading materials for educational purposes and for your own enjoyment. These materials may include magazines and newspapers sent from the community, with certain restrictions.") (emphasis added). Rather, under 28 C.F.R. § 540.71, BOP restricts reading materials only in number or on the basis of the potentially dangerous form or content of the material, even with respect to high security prisoners. Although prisoners in disciplinary segregation lose some privileges, the

regulation governing conditions of those prisoners does not limit the application of 28 C.F.R. § 540.71 with respect to newspapers and magazines. 28 C.F.R. § 541.21. *See also* United Nations Congress on Prevention of Crime and Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners (1955), *cited in Estelle v. Gamble*, 429 U.S. 97, 103 n.8 (1976), Rule 39 ("Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorized or controlled by the administration."); American Correctional Association, Standards for Adult Correctional Institutions (4th ed. 2003) ("Restriction to access [to publications] should be related directly to maintenance of institutional order and security.")

The LTSU's own track record dispels any lingering doubt regarding whether Petitioner's policy is a logical way to improve Respondents' behavior. Over a period of *2 ½ years*, only 10 prisoners have been moved from LTSU to other prisons. J.A. 138.[8] Two others were released directly back into the community when their sentences expired. *Id.* Petitioner concedes that "m`any" prisoners have remained on Level 2 the entire time that the LTSU has been in operation. J.A. 131-32. This suggests strongly that the great majority of Respondents will remain on Level 2 indefinitely, most likely

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[8] There is nothing in the record to suggest that it was the newspaper and magazine ban that led to the promotion of those 10 prisoners. Level 2 imposes a plethora of severe restrictions on prisoners, many of which may be viewed by Respondents as more burdensome than the publication ban. It is also quite possible that the prisoners who were promoted were motivated by factors unrelated to the harsh conditions or even that they had not in fact shown significant behavioral improvement. The first of five factors listed as considerations for promotion is "time in level." J.A 40. Thus, Petitioner may simply give up after a period of time.

until their sentences expire. Whatever "hope" that Petitioner had when the LTSU opened has been shown to be a false one.

B. The policy leaves Respondents with no alternatives for exercising their First Amendment rights

The second *Turner* factor is the severity of the deprivation, i.e., whether adequate alternatives remain for the exercise of the constitutional right. *Turner*, 482 U.S. at 90. Whether the Court defines the right at issue as the right to read newspapers and magazines, as the Court of Appeals did, the right to have some access to the news, or even more generally as the right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences," *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969), the restriction imposed on Respondents is the most severe deprivation of prisoner First Amendment rights that this Court has ever considered. Then-Judge Alito conceded in his dissent that "[t]his is the most troubling of the four factors." *Banks*, 399 F.3d at 149.

The deprivation goes much further than a ban on subscribing to periodicals. Respondents are not only barred from subscribing to newspapers and magazines, but are prohibited from *reading* them: they may not get them from the general prison library or borrow them from other prisoners. J.A. 156, 163. If they are found with a newspaper or magazine, it is considered a disciplinary infraction. J.A. 156. Friends and family are even barred from clipping out individual articles and sending them to Respondents. J.A. 154-55. Respondents are also prohibited from owning a television or a radio or listening to or viewing a program in a prison common area. J.A. 102. They may not order *any* non-religious publications. *Id.* They are completely barred from watching, listening to and reading news and commentary.

Petitioner and his *amici* appear to suggest that the right at issue is no more than maintaining some contact, however

slight or restricted, with *someone* outside the prison, or being allowed to read *something*. They argue further that alternatives to this right remain because Respondents can receive letters and request books from the general prison library. Br. for Pet. at 30; Br. for U.S. at 28.[9] However, Petitioner's position both mischaracterizes the right at issue and adopts an exceedingly broad view of what constitutes adequate alternatives.

This Court has held that the right in a prisoner case should be viewed not just "expansively," but also "sensibly." *Thornburgh*, 490 U.S. at 417. One can always view a right at a higher level of generality. In *Turner*, one could have argued that the right to marry was simply part of the more general right of association and that the prisoners retained adequate alternatives because they were still permitted to maintain other types of relationships. In the First Amendment context, one could argue that if prisoners are allowed to speak at all, then this factor of *Turner* is satisfied.

However, neither these views nor Petitioner's are faithful to the Court's instruction to view the right sensibly, i.e., practically. In defining a particular right, the Court should consider what constitutional values are at stake and whether those values can still be adequately served if the right is viewed at a higher level of generality. In *Turner*, it would not have been proper for the Court to view marriage as simply one of many kinds of fungible relationships, because marriage has special personal, spiritual and legal significance that other relationships do not. 482 U.S. at 95-96.

Similarly, the Court should not view reading news and commentary as just one of many forms of reading material or one way to communicate with those outside the prison, with no more significance to free speech values than writing a letter to

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[9] To receive a book from the library, Respondents must know what to ask for in advance without the aid of a list or index. J.A. 165-69. They are limited to no more than two books at one time. J.A. 39, 169.

a pen pal or having a conversation with a prison employee. The press plays an essential role in keeping citizens informed of public affairs. This role is even more crucial for prisoners, who necessarily lose many ways to stay active and involved citizens while they are incarcerated.[10]

Petitioner's view of what constitutes adequate alternatives cannot be sustained. Its logic leads to the *reductio ad absurdum* that a prisoner's First Amendment rights are not implicated until he or she is locked in a cell 24 hours a day with absolutely no ability to communicate, thus effectively rendering the First Amendment meaningless absent an independent Eighth Amendment violation. *See Jones 'El v. Berge*, 164 F.Supp.2d 1096, 1120-21 (W.D. Wis. 2001) (recognizing Eighth Amendment claim for social isolation and sensory deprivation).

Moreover, Petitioner's view cannot be squared with this Court's precedents. In *Turner*, the Court invalidated a marriage restriction even though the regulation permitted marriages in some circumstances. With respect to First Amendment rights, the Court has held that alternative means of communication must be both "reasonable and effective." *Pell*, 417 U.S. at 826. And, in *Thornburgh*, the Court concluded that the policy provided sufficient alternatives because

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[10] The United States suggests that prisoners may stay informed because family members can read newspapers and magazines and provide summaries in their letters or during a visit. Br. for U.S. at 28. This far-fetched "alternative" is misguided for several reasons. First, many prisoners would likely be unsuccessful in finding someone both willing and able to provide such a service. Second, it would simply be impossible for anyone to prepare even a minimally adequate summary of public affairs and other news and commentary in a letter or a once-a-month conversation. Finally, to the extent that a prisoner *was* able to obtain the same information in newspapers and magazines through letters or visits, this would simply prove further that the policy was irrational. For if the prisoner was still getting the same information, there would no deprivation, and thus no "deterrent" effect.

it permitted "a broad range of publications to be sent, received, and read," and that "a more broadly restrictive rule" could "run afoul of the second *Turner* factor." 490 U.S. at 418, 417 n.15. These statements make clear that the complete ban on receiving any non-religious publications is overly restrictive.

Petitioner further argues that Respondents have the "alternative" of escaping the ban by getting promoted to Level 1. Br. for Pet. at 30. But this is not an alternative for exercising free speech rights any more than it was an alternative for the prisoners in *Turner* to regain their marriage rights by obtaining early release through good behavior. This Court has never analyzed the second *Turner* factor in the manner urged by Petitioner. The relevant question has always been: what alternatives does the prisoner have *while the restriction is in force*? It is no alternative to say that a prisoner may have rights again at some time in the future.

In any case, the ban is enforced against each prisoner for a *minimum* of three months, J.A. 32. And under Petitioner's own policy, the ban is *intended* to last much longer, J.A. 31 ("Placement is anticipated to be long term."), an intention on which Petitioner has carried through. J.A. 130, 138 (testimony of deputy superintendent that only ten prisoners had been promoted out of the LTSU in 2 ½ years and all but three LTSU prisoners were then on Level 2).

C. Accommodating Respondents' First Amendment rights will have no more than a *de minimis* effect on legitimate penological interests

The third and fourth *Turner* factors assess the impact on "guards and other inmates, and on the allocation of prison resources generally" that accommodating the right would have and the availability of "ready alternatives" to the restriction that would have no more than a "*de minimis* cost to valid penological interests." *Turner*, 482 U.S. at 90-91.

Here, Petitioner's argument is at its weakest. Respondents are locked in their cells nearly around the clock, are excluded from all educational activities and other prison programs, may not work and earn money, may not buy items from the commissary, are denied all but the most minimal visiting privileges, and may not use the telephone except in emergencies. J.A. 32-33, 48, 102. They are excluded from even the additional privileges allowed to some Level 1 prisoners at the discretion of prison officials. J.A. 32-33. Yet Petitioner would have the Court believe that, in the face of all these other deprivations, letting the prisoners exercise the First Amendment right to read even a limited number of magazines and newspapers would undermine their rehabilitation and therefore prison security.

Arguably, the "costs" addressed by the third and fourth factors do not even encompass a state's interest in general deterrence. As stated by the Court in *Overton*, 539 U.S. at 135, the question is whether accommodation would "cause a significant reallocation of the prison system's financial resources" or "impair the ability of corrections officers to protect all who are inside a prison's walls." Where the interest asserted is neither security nor finances, these factors are a non-issue.

If the Court determines that the *Turner* framework does encompass "costs" to a behavior modification interest, it must limit either the weight it gives to the third and fourth factors or the deference it grants to the Petitioner's allegation that his ability to deter misconduct will be significantly impaired by accommodating the right. As explained in Part I, if one accepts Petitioner's premise that prohibiting Respondents from reading the news will improve their behavior, it follows that *any* accommodation of Respondents' First Amendment rights, no matter how small or easily granted, could potentially impair Petitioner's interest in behavior modification. Thus, almost by definition, there can be no "ready" alternative to the restriction,

making it impossible for prisoners to satisfy these factors, and giving prison officials carte blanche to deprive prisoners of any right they choose simply by alleging that the deprivation is part of a behavior modification plan.

The Petitioner has subjected Respondents to multiple, cumulative deprivations of the amenities of prison life. In the context of this massive deprivation of privileges, it is simply not credible that whatever rehabilitative or deterrent effect the sum of these deprivations may have will be significantly impaired by allowing Level 2 prisoners to read some small number of magazines and newspapers.

Thus, in *Turner*'s terms, the *de minimis* cost alternative is already in place. These numerous other restrictions are clearly sufficient to preserve Petitioner's asserted interest in using disincentives to modify behavior, absent any evidence that the newspaper and magazine ban contributes in any significant way to any deterrent effect of placement in Level 2.

Respondents are not being denied news because they have abused that right in the past. Petitioner has imposed the ban only because he believes it is yet another way to make life less pleasant for Respondents. It cannot be reasonably argued that lifting this single restriction will make the prison less safe or Respondents less likely to improve their behavior.

D. *Turner* is not toothless

This Court has recognized that "deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). But if Petitioner's arguments are accepted, there will simply be nothing left of the First Amendment for prisoners. *Turner* itself will become obsolete. The Court will return to the long-abandoned "hands-off" philosophy, in which prisoners are deemed to have no First Amendment rights that the prison official is bound to respect. Only the Eighth Amendment will remain as a potential substantive limit on deprivations imposed

on prisoners. *See* J.A. 28 (in Petitioner's summary judgment materials before district court, stating that it is Eighth rather than First Amendment that "legitimately constrains the array of punishments, behavior incentives and forms of deprivation that the prison system can use to modify the behavior of recalcitrant inmates").

Such a result would flatly contradict this Court's statement that *Turner*'s "reasonableness standard is not toothless," *Thornburgh*, 490 U.S. at 414, as well as the repeated declarations over the past 30 years that prisoners do not sacrifice all of their First Amendment rights when they pass through the jailhouse gate. *E.g.*, *Shaw*, 532 U.S. at 228-29; *Thornburgh*, 490 U.S. at 407; *O'Lone*, 482 U.S. at 348; *Turner*, 482 U.S. at 84. *See also Overton*, 539 U.S. at 138 (Stevens, J., concurring) (rejecting view that *Overton* "signals a resurrection" of hands-off approach). The Court's review of prisoners' constitutional claims must be "responsive both to the 'policy of judicial restraint regarding prisoner complaints *and* [to] the need to protect constitutional rights.'" *Turner*, 482 U.S. at 85 (quoting *Martinez*, 416 U.S. at 406) (emphasis added). To do this, the Court must place some limit on the government's discretion to restrict constitutional rights under the guise of deterrence, or its promises to uphold prisoners' constitutional rights will be merely empty words.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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APPENDIX

INTERESTS OF AMICI CURIAE

The **American Civil Liberties Union** (ACLU) is a nationwide, non-profit, nonpartisan organization of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Consistent with that mission, the National Prison Project of the ACLU Foundation was established in 1972 to protect and promote the civil and constitutional rights of prisoners. The **ACLU of Pennsylvania** is a state affiliate of the ACLU.

The **Legal Aid Society** is a private organization that has provided free legal assistance to indigent persons in New York City for nearly 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure that prisoners are afforded full protection of the constitutional and statutory rights. The Society advocates on behalf of prisoners in New York City jails and New York state prisons, and conducts litigation on prison conditions.

People For the American Way Foundation is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civil and educational leaders, People For now has over 750,000 members nationwide who are dedicated to the democratic tradition of liberty and freedom embodied in this country's Constitution. One of the organization's primary objectives is to educate the public on the vital importance of these principles, and to defend them through litigation and other means as necessary. People For has frequently represented parties and filed amicus curiae briefs in similar cases and is vitally concerned with the threat to basic First Amendment freedoms posed by this case.

The **American Friends Service Committee** (AFSC), the social justice and peace organization formed by the Religious Society of Friends (Quakers) in 1917, has worked with prisoners, their families, and with prison officials since 1947. AFSC's work stems from the belief that the way a society treats people convicted of crimes is an indicator of the human values of that society and Quakers' belief in the intrinsic work of all human beings. Quakers not only founded AFSC, they also founded the penitentiary, institutions initially comprised of isolation units, the predecessors of today's supermax prisons. Through AFSC's criminal justice work, especially with programs developed to monitor the conditions in isolation units across the nation, AFSC believes that isolation units should be abolished because of the inhumane conditions that are endemic to these institutions and practices. AFSC has published a variety of reports and histories regarding control or isolation units, and its staff members have testified widely on the issue. In 1997, AFSC published a "Survivor's Manual," written by prisoners who survived isolation for other prisoners facing the same situation. The policies at issue would ban the "Survivor's Manual" and other AFSC publications promoting institutional change through nonviolent means.

California Prison Focus (CPF) is a nearly two decade old human rights organization that defends and advances the rights of prisoners in California, particularly those confined in super-maximum security units. CPF publishes a monthly newsletter, to which approximately 800 prisoners subscribe.

(6)

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No 04-1739

IN THE

Supreme Court of the United States

JEFFREY BEARD,

Petitioner

v.

RONALD BANKS,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Respondent pursuant to Rule 37.3 of this Court.[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan public interest law firm dedicated to protecting the free expression of *all* religious traditions and the equal participation of religious people in public life and public benefits. Over its first twelve years of existence, The Becket Fund has represented Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Sikhs, and others in cases involving the full range of religious freedom issues under federal and state constitutional and statutory law. In particular, *amicus* has been intimately involved as either lead counsel or *amicus curiae* in numerous cases defending the religious exercise rights of prisoners.

Amicus submits this brief to highlight the danger of upholding the deprivation theory of behavior modification advanced by Petitioner to defend its suppression of the constitutional right at issue in this case. Because deprivation theory transforms constitutional rights into mere privileges that can be manipulated at will by prisons to gain leverage over inmates, endorsement of this theory by this Court will grant prisons the ability to declare open season on all constitutional rights in the prison setting. Inevitably, the

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[1] All parties have consented to the filing of this brief. Consent letters from Petitioner and Respondent are being filed concurrently with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

most valued constitutional rights of prisoners—like the free exercise of religion—will be most at risk because the deprivation theory has its greatest usefulness for prisons when it targets the most-treasured constitutional rights for suppression.

SUMMARY OF ARGUMENT

The petitioner to this Court raises a unique theory—the deprivation theory of behavior modification—to justify its suppression of the constitutional rights in this case. On this theory, inmates who behave as the prison wants will be rewarded by being granted so-called "privileges." Inmates who do not are denied these privileges. The power to selectively grant or deny privileges in this way gives the prison significant leverage over its inmates.

At first glance, deprivation theory, especially when applied to true privileges such as use of the weight room or access to cigarettes, seems innocuous. After all, with incarceration comes the forfeiture of most freedoms that law-abiding citizens enjoy. But when deprivation theory is applied to suppress not mere *privileges*, but constitutional *rights* that prisoners do *not* forfeit upon incarceration, *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979) ("convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."), the theory transforms from innocuous to insidious.

The central tenet of deprivation theory is that prison authorities should be able to use constitutional rights as levers to induce prisoners to behave the way the prison wants. But under this theory, of course, constitutional rights are no longer rights not subject to forfeit—they are mere licenses (on par with such trivial privileges as using the weight room) that the prison can give or take depending on what it believes best.

And there is no stopping point to deprivation theory's vicious logic. The right threatened by deprivation theory in this case—the right of inmates to receive publications—has long been considered constitutional by this Court. *See Thornburgh* v. *Abbott*, 490 U.S. 401, 408 (1989). So if

deprivation theory can be applied to deny this right, nothing will stop prison officials from applying it to deny other fundamental rights, especially the right to free exercise of religion. Indeed, it is a perverse irony of deprivation theory that the more fundamental the constitutional right, the more incentive the government has to deny the right because prisons will gain the most leverage over the behavior of prisoners by taking away the most important and valued rights. When prisons recognize these simple facts, they will use deprivation theory whenever possible—which is to say that there will soon be no constitutional rights left for those in prison.

Because deprivation theory transforms constitutional rights into mere privileges that can be manipulated at will by prison officials, the theory is fundamentally inconsistent with this Court's precedents that inmates retain constitutional rights in prison, and this Court should reject it. In addition, as discussed below, deprivation theory is incompatible with the four factors for assessing constitutional claims in the prison context laid out in *Turner* v. *Safley*, 482 U.S. 78 (1987). Deprivation theory is not neutral because it is directly related to the suppression of constitutional expression and it is designed to close off all alternative avenues of expression of the constitutional right at issue. And unlike the ordinary case, where the prison claims that suppression of the right is needed to prevent some negative secondary effect, deprivation theory rests on the premise that the "harm" arises not from a secondary effect, but from the mere fact that the inmate has a right that can be exercised without the prison's consent.

ARGUMENT

I. DEPRIVATION THEORY IS INCOMPATIBLE WITH MAINTAINING INMATES' MOST FUNDAMENTAL CONSTITUTIONAL RIGHTS

This Court has made clear that that, "as members of this society, prisoners retain constitutional rights that limit the exercise of official authority against them." *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 355 (1987). *See also Overton* v. *Bazzetta*, 539 U.S. 126, 138 (2003) (Stevens, J., concurring) (the "restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual.") (citations and quotations omitted). To be sure, constitutional rights in prison are subject to limitations, "both from the fact of incarceration and from valid penological objectives." *O'Lone*, 482 U.S. at 348. Some rights are difficult to reconcile with the nature of prison, *see, e.g.*, *Overton*, 539 U.S. at 131 ("freedom of association is among the rights least compatible with incarceration"), and other rights, when exercised, can pose harm to a prison's interests by creating "legitimate security concerns" or causing harmful "ramifications on the liberty of others." *Turner* v. *Safley*, 482 U.S. 78, 90-91 (1987). But though the exercise of constitutional rights is subject to limits, this Court has removed all doubt that prisoners are still endowed with constitutional *rights*—not mere privileges—when incarcerated. *See Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979) ("convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison.").

At one level, Pennsylvania's effort to restrict the right of prisoners to receive harmless newspapers, magazines, and photographs seems to present an ordinary application of the

analysis the Court has developed for addressing prison infringements of constitutional rights: the state has limited inmates' access to publications; this Court has held that inmates have a constitutional right to receive publications, *see Thornburgh* v. *Abbott*, 490 U.S. 401, 408 (1989); therefore, the four-part *Turner* test must be applied to assess the constitutionality of the infringement.

But what makes this case far from ordinary is the novel "deprivation theory of behavior modification," Petitioner's Br. at 26,[2] advanced by Pennsylvania to defend its policy of suppressing constitutional rights. As *amicus* explains below, the deprivation theory is significant because if endorsed by this Court it will grant prisons free rein not only to deny the constitutional right to receive publications at issue in this case, but to deny the right to free exercise of religion and all other constitutional rights in prison.

The deprivation theory is easy enough to describe. The state, in its brief, explains it succinctly: "By treating access to newspapers and magazines as a *privilege* to be earned (or retained), the LTSU program provides an incentive for good behavior and a deterrent to bad behavior." Pet. Br. at 5 (emphasis added). The theory is equally easy to understand. Inmates who behave as the prison wants will be rewarded by the grant, at the prison's discretion, of the "privilege" of exercising constitutional rights. Inmates who do not are denied this "privilege." Psychologists might

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[2] In the courts below, Pennsylvania asserted two other theories to justify the policy at issue—it claimed that the restricted materials could be used either as contraband or as a means to conceal contraband. *Amicus* does not doubt that such fears, if properly substantiated, might be sufficient to sustain the policy. But the court below found little evidence in the record to support those concerns, and the state in this Court seems to have largely given up on these arguments.

describe this conditioning process as "positive and negative reinforcement," but one need not be a psychologist to understand the simple operational premise of this theory.

Though its simplicity may lend the appearance of harmlessness, the deprivation theory is in fact radically different from other justifications for prison regulations that restrict the exercise of constitutional rights. In the ordinary case, the prison identifies some negative consequence that may result from the exercise of the right in the prison setting. Perhaps the exercise of the right will endanger "legitimate security concerns," or have a harmful impact on the prison guards, other inmates, or prison resources. *Turner*, 482 U.S. at 90-91. In this way, the prison usually alleges some harm flowing from the exercise of the right—either to its own interest or of others—and then adds that other avenues are available for exercising the constitutional right that would not threaten those interests. *Id.*

In contrast, the deprivation theory does *not* rest on the idea that exercise of the right harms some interest of the prison. For example, in this case, Pennsylvania does not claim that the right to receive publications is incompatible with the mere fact of incarceration. Nor does it allege that this right causes any latent harm, or risk of harm, to its interests. Indeed, Pennsylvania does not claim that the exercise of the constitutional right will pose any harm or difficulty for anyone. Instead, the prison prevents exercise of the constitutional right simply because it wants to induce prisoners to behave differently. The inmates will understand this and will, if they wish to regain the ability to exercise even the constitutional rights they retain in prison, conform their behavior to the desired standard. As a result, deprivation theory enables prisons (like Pennsylvania here) to convert constitutional rights into mere privileges that can be used as levers—as sticks and carrots—to force inmates into complying with whatever rules the prisons may set.

The opinions below and the Petitioner and its *amici* debate at length whether the deprivation theory will be effective in achieving its goals. But effectiveness is beside the point where the means used to achieve the desired goal are illegitimate. And this is the real problem with deprivation theory: it is antithetical to the fundamental premise of this Court's precedents that prisoners retain constitutional rights, not just privileges, that constrain the power of prison authorities. Indeed, deprivation theory has no limiting principle; under it, all constitutional rights become mere licenses that prison officials can take away at their discretion.

Deprivation theory provides the state with a rationale for taking away *any* constitutional rights a prisoner may have, because anything that is of value to a prisoner will now be of value to the state as leverage. This is of particular concern to *amicus*, who works to protect the religious exercise rights of inmates. At least for the present, Pennsylvania does not apply deprivation theory to limit religious exercise—religious material is exempted from the general ban on publications, and chaplain visits are exempted from the general ban on visitation.

But this is small consolation to *amicus*, for Pennsylvania's argument that constitutional rights are mere privileges that can be withheld at will may end at any time. The right to religious exercise—including access to the Bible or other sacred texts—is a fundamental guarantee of the Constitution, not a mere privilege that can be withdrawn at the whim of prison officials.

Thus, although Pennsylvania exempts religious materials from its policy today, it may not do so tomorrow if it decides that withholding access to religious texts would enhance its leverage over prisoners. And, of course, other

prison systems might go even further, not only denying prisoners access to texts, but denying the ability to exercise their religion altogether: prohibiting them from praying, attending worship services, keeping a religious diet, observing sacraments, receiving or using devotional items, or consulting with chaplains. Deprivation theory not only permits such an approach, but recommends it—for depriving prisoners of such a fundamental right as religious exercise will only enhance the leverage of prisons under the deprivation theory.

The undermining effect of deprivation theory on constitutional rights in prison is also highlighted by its potential effects on the constitutional right to marry. In *Turner*, the Court recognized the right to marry as a fundamental right that prisoners retain, and held that the prison in that case had not demonstrated a sufficient logical nexus between the prison's asserted interests of security and rehabilitation and its policy of limiting marriage. But the very importance to inmates of the right to marry would provide the requisite logical nexus for supporting the prison's justification for using it as lever to modify behavior under the deprivation theory. For the very things that make the right to marry so important to inmates would also motivate inmates to conform their behavior to whatever standard the prison may set in order not to lose it.

This is perhaps the most perverse aspect of deprivation theory. A state's incentive to use constitutional rights as leverage will be directly proportional to the importance of those rights to inmates. And so the best way for the state to gain the most leverage over inmates is to use their most fundamental constitutional rights as incentives. So, if Pennsylvania is correct that use of deprivation theory will cause inmates to change their behavior if they're denied access to photographs and magazines, how much greater will prisons' leverage be if they can manipulate inmates by

withholding the right to read the Bible, worship, pray, marry, or engage in any other constitutionally protected activity?[3]

It is this perversity of the deprivation theory that led Judge Tatel of the D.C. Circuit to issue a stinging criticism of another incarnation of the deprivation theory. In *Kimberlin* v. *Department of Justice*, 318 F.3d 228 (D.C. Cir. 2003), the federal Bureau of Prisons advanced the same deprivation theory asserted here, labeling it instead an interest in punishment and deterrence. Judge Tatel quickly cut right to the core of this argument:

> Does the goal of enhancing the punitive and deterrent value of prison by making prison conditions more onerous justify limiting prisoners' constitutional rights? As long as *Safley* is the law – that is, as long as prisoners generally retain their constitutional rights – the answer must be no, for there is no discernible limit to the government's ability to invoke punishment or deterrence as reasons for adopting regulations that restrict constitutional rights. Th[is] rationale . . . could also justify banning . . . all books, including the Bible and the Koran, on the ground that denying these "perks" will make

[3] In addition to the constitutional problems that deprivation theory raises, there is a thorny statutory issue as well. The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, prevents state prisons from substantially burdening religious exercise, unless the burden is the least restrictive means of serving a compelling government interest. *See Cutter* v. *Wilkinson*, 125 S. Ct. 2113 (2005). If this Court were to sanction deprivation theory, the question of whether (and in what circumstances) deprivation theory could constitute such a compelling interest would be an issue that would surely soon come before the Court.

> prison more onerous and more of a place of deterrence and punishment.

Id. at 239 (Tatel, J., concurring in part and dissenting in part) (citations and quotations omitted).[4]

Moreover, if this Court deems the deprivation theory of behavior modification a "legitimate penological interest" that may justify the deprivation of constitutional rights, prisons will have a strong incentive to recast all of their policies in terms of it. Deprivation theory's rationale can provide constitutional cover for *every* policy limiting the exercise of constitutional rights in prison. Deprivation theory will then expand, as prisons recognize their interest in creating incentive schemes wherever possible. And as it expands, the exercise of constitutional rights most precious to prisoners will shrink and the Court's promise that "prisoners retain constitutional rights that limit the exercise of official authority against them," *O'Lone*, 482 U.S. at 355, will be reduced to a nullity.

Significantly, Pennsylvania and its *amici* do not deny that the more fundamental (and thus desirable to the inmate)

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[4] In *Kimberlin*, the court ultimately ruled for the government, but on the basis that the privilege denied the prisoner in that case—playing the electric guitar—"does not implicate the appellant's First Amendment rights and . . . we therefore need not invoke the four factor analysis the United States Supreme Court established in *Turner*." *Id.* at 232. Indeed, the approach of the D.C. Circuit also demonstrates another point. Prisons will be able to maintain plenary control over the vast majority of true privileges in prison—whether it be access to electric guitars, the weightroom, or cigarettes—because not every inmate activity is imbued with constitutional significance. But what this Court should not countenance is prisons re-defining true constitutional rights like free exercise of religion as just another "privilege" like electric guitar playing that can be manipulated at will by prison officials.

the constitutional right, the more tempted prisons will be to suppress the exercise of that right under the deprivation theory. Instead, they either embrace this as a virtue, *see, e.g.*, Brief for United States as Amicus Curiae Supporting Petitioner, at 19 n.7 (stating that there is "a common-sense logical connection between the denial of desirable inmate privileges and the objective of inducing behavioral reform"), or seek to whitewash the issue by steadfastly referring to constitutional rights as mere "privileges." *See, e.g.*, Petitioner's Brief at 5; Brief for United States (using the word "privilege" 36 times in its argument section alone, and questioning whether so-called "privileges that implicate First Amendment interests" of inmates should be treated as "categorically different from other privileges" under the Constitution.)

Neither approach provides a basis to upset the balance this Court struck in *Turner*, when it pledged to be "responsive both to the policy of judicial restraint regarding prisoner complaints and to the need to protect constitutional rights." *Turner*, 482 U.S. at 85 (citations omitted). Although Pennsylvania now wants to use the deprivation theory to re-weight the *Turner* balance in its favor, this Court should adhere to its pronouncement that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison," *Bell*, 441 U.S. at 545, and reject deprivation theory as a basis for limiting constitutional rights.

II. DEPRIVATION THEORY IS INCOMPATIBLE WITH THE FOUR *TURNER* FACTORS

The attempt to jeopardize all constitutional rights in prisons in a single stroke—by recasting them as mere privileges that the state can leverage for its own ends—should be reason enough to reject the deprivation theory. But deprivation theory is unacceptable for a second reason: it is

incompatible with the application of the traditional *Turner* v. *Safley* factors.

Turner's first prong requires that the government be acting pursuant to a "valid penological interest" that is both "legitimate and neutral." *Turner* v. *Safley*, 482 U.S. 78, 90-91 (1987). And for the interest to be "neutral," this Court has explained, it must be "'unrelated to the suppression of expression.'" *Thornburgh* v. *Abbott*, 490 U.S. 401, 415 (1989) (citing *Procunier* v. *Martinez*, 416 U.S. 396, 413 (1974)); *see also Turner*, 482 U.S. at 83 (repeating this test). But under deprivation theory, the state's interest is not just *related to* the suppression of the right, the state's interest here *is precisely* the suppression of the right.

Unlike the typical case of a prison regulating a constitutional right, the deprivation theory does not attempt to curb some unprotected aspect of the right or quell some negative effect (*e.g.*, security) associated with the exercise of the right. *Cf. Thornburgh*, 490 U.S. at 415 (preventing certain publications from reaching prisoners because "of their potential implications for prison security"). Instead, under the state's deprivation theory, denial of the constitutional right (whether it be the right to receive publications as in this case, or the right to read the Bible or other sacred text in the next) is precisely the goal of the regulation. This point should be clear from the theory's title. Deprivation theory requires the deliberate suppression of inmate constitutional rights, and for the very sake of inflicting the consequent harm on the inmate.

Pennsylvania seeks to avoid the obvious conclusion that its use of deprivation theory is aimed at the suppression of a constitutional right by claiming that its true goal here is to facilitate rehabilitation of prisoners. But the claim that transforming constitutional rights into a mere privilege that the prison can withdraw at any time under the guise of this

noble purpose does not suffice to undo the damage of deliberately targeting a constitutional right for extinction. For that purpose (whether it be rehabilitation or something else) is purely derivative of the initial improper purpose, and just as much related to the suppression of expression. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496-97 (1975) ("The constitutional reference must therefore be not to the ultimate interest to which the state points, for that will always be unrelated to [the suppression of the constitutional right,] but rather to the causal connection the state asserts.").[5]

Turner's first prong is therefore fatal for deprivation theory. But deprivation theory is also deeply inconsistent with the rest of the *Turner* factors. The *Turner* framework is premised on a situation where the prisoner seeks exercise of a right, and the prison claims some conceptually distinct harm arising from the right's exercise. Courts then evaluate whether the prison policy still allows other avenues of expression of the right (the second *Turner* factor); the impact that an inmate's exercise of the right has on other inmates, guards, and prison resources (the third *Turner* factor); and whether the prison could somehow avoid harm to valid penological interests without infringing the right (the fourth *Turner* factor). *See Turner*, 482 U.S. at 90-91. But the

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[5] Petitioner and its *amici* make much of stray language in this Court's opinion in *Overton v. Bazzetta*, 539 U.S. 126 (2003), which they claim supports use of the deprivation theory. But the permissibility of the deprivation theory was neither squarely presented nor briefed in *Overton* and was certainly not essential to the holding of that case, that restricting visitation rules "to prevent smuggling or trafficking in drugs," *id.* at 129, by inmates imprisoned for that very crime was a constitutionally permissible penological interest.

application of deprivation theory renders consideration of these factors incoherent.

Consider *Turner*'s second factor—the question of whether other avenues exist for the exercise of the asserted right. That factor does not harmonize with successful implementation of the deprivation theory, because it puts a prison in a very strange position. The prison has to argue that there are other ways for the prisoner to exercise his rights, but the very existence of those alternative avenues undermines the system of incentives necessary to the operation of the deprivation theory—for a prison cannot gain any leverage from the taking away of a constitutional right if the right is easily obtained in some other way. The Solicitor General implicitly recognizes this, and sees in it an opportunity to eviscerate the requirement of alternative means altogether. *See* Brief for United States as Amicus Curiae Supporting Petitioner, at 11 ("Although inmates have no alternative means of receiving newspapers, magazines, and photographs [under Pennsylvania's use of the deprivation theory] . . ., the very object of the restrictions is to deny those materials in order to induce behavioral reform.").

The third *Turner* factor—the impact that an inmate's exercise of the right has on other inmates, guards, and prison resources—is similarly inconsistent with deprivation theory. Again, unlike the normal case where the prison claims that exercise of the right in prison creates some type of negative secondary effect, deprivation theory makes no claim that the exercise of the right has such a harmful impact on other inmates, guards, or prison resources. Indeed, the prison is perfectly willing to allow the activity countenanced by exercise of the right, but only if the inmate will first behave the way the prison wants.

But perhaps the best example of the inconsistency between deprivation theory and *Turner*'s framework arises under the fourth factor. That factor examines whether there are "ready alternatives" to the regulation that "fully accommodate the prisoners' rights at *de minimis* cost to valid penological interests." *Turner*, 482 U.S. at 90-91. In other words, it asks whether the prison can address the harm that exercise of the constitutional right creates without infringing the right itself. The central premise of this factor is that any harm to the prison's interests is conceptually distinct from the right. But in the view of deprivation theory, the harm to the prison *is* the very fact that the inmate is endowed with a right that can be exercised without the prison's approval.

This is where *Turner* truly breaks down, for it makes no sense to ask whether the prison can permit the exercise of the right and still maintain its objectives, when its very objective is to stop prisoners from having a right that inmates can exercise without prison approval in the first place. This is why Pennsylvania does not address the fourth *Turner* factor and the Solicitor General treats it as tautologically satisfied. *See* Brief for United States, at 29 (arguing that "partially restoring the denied privileges" would "nullify the basic object of the restrictions" because the basic object of the restrictions was indeed to deny the privileges).

In sum, deprivation theory is incompatible with all of the *Turner* factors and should therefore be rejected as a legitimate justification for restricting the exercise of constitutional rights (as opposed to non-constitutional privileges).

CONCLUSION

For generations now, inmates have relied on the Court's promise that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and

confinement in prison." *Bell*, 441 U.S. at 545. Deprivation theory, if accepted by the Court, will bury that promise and the *Turner* framework along with it. It will represent the beginning of the end of constitutional rights in prison. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JEFFREY BEARD,

Petitioner,

v.

RONALD BANKS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a prison policy that denies newspapers, magazines, and photographs to the most difficult inmates in the prison system in an effort to promote security and good behavior violates the First Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.[1] Prison administration is a core function of all States and many local governments. The proper application of the standards of judicial review set forth in *Turner v. Safley*, 482 U.S. 78 (1987), regarding the deference which federal courts must show to the decisions of prison administrators is therefore of continuing concern to *amici* and their members.

As the Court held in *Turner*, federal courts "are ill equipped to deal with the increasingly urgent problems of prison administration," *id.* at 84 (citation omitted), and must uphold prison regulations challenged as unconstitutional if "reasonably related to legitimate penological interests." *Id.* at 89. Moreover, in this case, which involves judicial review of state prison administration, federal courts have "additional reason to accord deference to the appropriate prison authorities." *Id.* at 85 (citation omitted).

The court of appeals disregarded this Court's teachings in *Turner* and other cases to hold unconstitutional Pennsylvania's policy of denying newspapers, magazines, and photographs to what the lower court recognized were "the most incorrigible and difficult prisoners" in the State's custody. Pet. App. 11a. In so holding, the court disregarded the reasonable judgment of the State's prison administrators and engaged in precisely the sort of micromanagement of state prisons that this Court has repeatedly held to be impermissible. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 361-63 (1996).

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

Because the holding of the court of appeals improperly restricts the ability of prison administrators to manage correctional facilities in ways clearly related to legitimate penological interests, *amici* submit this brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

In *Turner v. Safley*, 482 U.S. 78, 85 (1987), the Court "formulate[d] a standard of review for prisoners' constitutional claims that is responsive both to the policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights." (internal citation and quotation omitted) The court of appeals misapplied each of the four *Turner* prongs to Pennsylvania's regulation that denies newspapers and magazines to those inmates who, because of their intractability, have been assigned to LTSU Level 2. Moreover, in violation of *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003), the panel majority shifted the burden of proof from respondent, to disprove the validity of the regulation, to the State to prove its validity.

1. The court of appeals held that the State's regulation lacks a rational relationship to a legitimate penological interest. While the court acknowledged that the State had a strong penological interest in deterring infractions of prison rules, it also observed that confinement in LTSU Level 2 can be of an indeterminate duration. The court therefore concluded that the State's "rehabilitation justification" was "illogical." Pet. App. 12a. The court also faulted the State because it "offered no evidence that the rule achieves or could achieve its stated . . . purpose." *Id.*

This reasoning is erroneous. Under *Turner* and *Overton*, the State has no obligation to offer evidence showing that the LTSU rule achieves its stated purpose. Rather, under *Turner*'s first prong, the State is only required to articulate a

plausible justification for its regulation. There are several plausible justifications for the State's rule.

For example, it is rational to believe that denying privileges to troublesome inmates will induce them to modify their behavior and obey prison rules whether their initial assignment to LTSU Level 2 is for a fixed or indeterminate duration. Moreover, the policy serves as an incentive to those inmates who are not in the LTSU—whether they are in the general population or one of the other units used to manage difficult inmates—to behave or suffer the loss of their privileges through assignment to the LTSU. The court of appeals failed to recognize this "self-evident connection to the State's interest in maintaining prison security" and order. *Overton*, 539 U.S. at 133.

2. The court of appeals erroneously held that LTSU Level 2 prisoners did not have adequate alternative means for exercising their First Amendment rights. According to the court, the State's rule imposed a "blanket" prohibition on Level 2 prisoners' access to newspapers and magazines. Pet. App. 19a.

The court ignored that Level 2 inmates retain significant First Amendment rights. They can engage in expressive activity by writing letters. Moreover, they can obtain books from the prison library. They can obtain information about political and social events by asking that their family members include such information in their letters. Level 2 prisoners can also receive this information from family members during monthly visits. Finally, Level 2 prisoners can gain access to newspapers and periodicals by modifying their behavior.

3. The court of appeals further erred in holding that there were two ready alternatives to the State's regulation. According to the court, the State could distribute a newspaper or magazine to each inmate who requested one and retrieve it at the end of a reading period. *See id.* at 22a. Alternatively, the

State could escort each inmate to the mini-law library where they could "read a periodical of their choosing." *Id.* at 23a.

Both alternatives are problematic because they would result in an increase in the number of interactions between guards and inmates and thus raise the potential number of security incidents. Under the first alternative, the guards would still have to retrieve the newspaper at the end of the reading period at which time an inmate could use it to commit an assault. And given the troublesome nature of Level 2 inmates, it is reasonable to believe that on occasion some might refuse to return the newspaper and thus cause a confrontation with the guards.

Under the second alternative, it is obvious that prisoner demand for library visits would increase substantially because being able to look at newspapers and magazines would reduce the harshness of LTSU confinement. While the court of appeals "fail[ed] to see how the mere addition of non-legal and non-religious periodicals to the materials already available to the inmates in the library" would burden the State, *id.* at 24a, it is rational to believe that many prisoners would find newspapers and magazines more entertaining than the Federal Reporter series and insist upon receiving every visit that the State's regulations entitle them to. This alternative would clearly result in substantial additional burdens upon the prison system and its personnel, including the guards needed to escort inmates on library visits.

ARGUMENT

THE COURT OF APPEALS FAILED TO GIVE PROPER DEFERENCE TO THE JUDGMENT OF PENNSYLVANIA'S PRISON OFFICIALS

The court of appeals held violative of the First Amendment Pennsylvania's policy that denies newspapers, magazines and photographs to those inmates who are so troublesome as to

warrant assignment to Level 2 of the State's Long Term Segregation Unit (LTSU). Notwithstanding that inmates assigned to the LTSU Level 2 are "the most incorrigible and difficult prisoners" in the State's custody, Pet. App. 11a, the court rejected Pennsylvania's contention that the policy was justified by its legitimate penological interests in encouraging LTSU prisoners to modify their behavior and in preserving institutional security.

In so holding, the court of appeals engaged in micro-managing of the most intrusive sort and ignored the fundamental teachings of *Turner v. Safley*, 482 U.S. 78 (1987). While the court's opinion pays lip service to the *Turner* factors, its application of them reflects a blatant disregard for *Turner*'s instruction regarding the respective roles and competencies of the courts and prison administrators. As explained below, in analyzing the first *Turner* factor, the court failed to defer to the expert judgments of the State's prison administrators. Instead, the panel majority imposed heightened scrutiny by requiring that the State adduce empirical proof that prison policies will achieve the desired objective and by dismissing the rational judgments of administrators.

The court below also erred in analyzing the impact that accommodation of the right would have on the prison and whether there are alternative means for the State to accomplish its penological objectives. Indeed, the problematic nature of the alternatives suggested by the court demonstrates why prison administrators and not judges should make decisions of this sort. The judgment of the court of appeals should therefore be reversed.

A. In Reviewing Prisoners' Constitutional Claims Federal Courts Are Required To Show Appropriate Deference To The Policy Decisions Of Prison Administrators

The Court has held that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," and that "federal courts must take cognizance of the valid constitutional claims of prison inmates." *Turner*, 482 U.S. at 84. Thus, as a general proposition it is undisputed that prisoners retain some constitutional rights, including some First Amendment protections.

"[I]t is obvious," however, that prisons "differ in numerous respects from free society. They, to begin with, are populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance." *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977).

The Court has therefore long recognized that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948) (quoted in *Jones*, 433 U.S. at 125 (collecting cases)). As the Court further explained in *Jones*, "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration." 433 U.S. at 125. The Court has accordingly held that:

> [A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and

> care the prisoner has been committed in accordance with due process of law.

Pell v. Procunier, 417 U.S. 817, 822 (1974) (quoted in *Jones*, 433 U.S. at 125).

This Court has repeatedly recognized that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Turner*, 482 U.S. at 84 (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)); *see also Lewis v. Casey*, 518 U.S. 343, 361-63 (1996); *Jones*, 433 U.S. at 126. As the Court recognized in *Turner*, "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." 482 U.S. at 84-85. And "[w]here a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities." *Id.* (citing *Martinez*, 416 U.S. at 405). *See also Lewis*, 518 U.S. at 362 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973)); *Jones*, 433 U.S. at 126 (quoting *Martinez*, 416 U.S. at 405).

The Court has accordingly directed that federal courts should "ordinarily defer to [the] expert judgment" of state prison administrators in setting penological policies. *Pell*, 417 U.S. at 827. As the Court explained in *Jones*, "[b]ecause the realities of running a penal institution are complex and difficult, we have . . . recognized the wide-ranging deference to be accorded the decisions of prison administrators." 433 U.S. at 126.

This Court adopted the *Turner* standard to give appropriate weight to these important considerations. *See* 482 U.S. at 85. As the *Turner* Court explained, "[o]ur task . . . is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights." *Id.* (quoting *Martinez*, 416 U.S. at 406).

The four-prong *Turner* standard is not "a standard of heightened scrutiny." *Id.* at 87. Yet, as explained below, the court of appeals plainly applied a heightened standard of review to Pennsylvania's LTSU policy. Moreover, contrary to this Court's explicit instruction in *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003), and earlier cases, *see id.* (collecting cases), the panel majority shifted the burden of proof from the prisoners to disprove the validity of the regulation to the State to prove its validity. The court below thus did exactly what *Turner* admonishes that federal courts must not do: it became "the primary arbiter[] of what constitutes the best solution to [an] administrative problem, thereby 'unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.'" 482 U.S. at 89 (quoting *Martinez*, 416 U.S. at 407). The judgment below should therefore be reversed.

B. Pennsylvania's Policy Of Denying Newspapers, Magazines And Photographs To LTSU Level 2 Inmates Satisfies The *Turner* Standard

In *Turner*, the Court articulated four factors for determining whether a prison rule violates a prisoner's constitutional right: "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)). Second, the Court examines "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. Third, the Court determines "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* Finally, the Court examines "whether there are 'ready alternatives' to the regulation." *Overton*, 539 U.S. at 132 (citing *Turner*, 482 U.S. at 90-91).

1. *The LTSU Policy Has A Valid, Rational Connection To A Legitimate Governmental Interest.*

Under the first *Turner* factor, "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." 482 U.S. at 89. The Court has explained that "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Id.* at 89-90. Furthermore, "the governmental objective must be a legitimate and neutral one." *Id.* at 90.

The court of appeals repeatedly ignored that these formulations do not impose a standard of heightened scrutiny but rather that of rational basis review. Under rational basis review, the State does not have the obligation of proving the validity of its regulation. *See Overton*, 539 U.S. at 132; *cf. Heller v. Doe*, 509 U.S. 312, 320 (1993) ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.") (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993)). Rather, the burden is on "the prisoner to disprove it." *Overton*, 539 U.S. at 132. And under the classic formulation, "'[t]he burden is on the one attacking the [rule] to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320-21 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).[2]

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[2] *Amici* acknowledge that the source of these rational basis formulations were cases that challenged legislative classifications. But whether a court is reviewing the action of a legislative body or the policy decision of prison administrators, the same separation of powers concerns exist. As *Turner* explains, "[p]rison administration is . . . a task that has been committed to the responsibility of [the legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint." 482 U.S. at 85.

The court of appeals acknowledged that "'deterrence of future infractions of prison rules' is a legitimate penological interest." Pet. App. 10a (quoting *Gregory v. Auger*, 768 F.2d 287, 290 (8th Cir. 1985), and citing *Daigre v. Maggio*, 719 F.2d 1310, 1313 (5th Cir. 1983)). The court also "agree[d] that deterrence of future infractions of prison rules can be an appropriate justification for temporarily restricting the rights of inmates." *Id.* at 11a. The court, however, then faulted the State for not having "shown how the regulations in this case serve such a purpose." *Id.*

This was so, the court reasoned, because "[t]he LTSU is not a place where inmates are sent for a discrete period of punishment, pursuant to a specific infraction, but is a place for 'Long Term' segregation of the most incorrigible and difficult prisoners as long as they fall under that umbrella." *Id.* Noting that "several inmates have remained in Level 2 since the LTSU's inception two years ago," *id.* at 12a, the court observed that "[a]s administered, it is unclear how the policy would achieve the deterrence it seeks." *Id.* The court thus concluded that "[n]ot only is the rehabilitation justification illogical given the nature of LTSU confinement, but LTSU Level 2 is a far cry from the disciplinary contexts in which such bans have been deemed constitutional." *Id.* The court further faulted the State because it "offered no evidence that the rule achieves or could achieve its stated rehabilitative purpose." *Id.* at 14a n.10.

The court's reasoning reflects several fundamental errors. Under *Overton* and other cases, the State is not required to offer evidence that, as the court of appeals put it, "the rule achieves or could achieve its stated . . . purpose." *See Overton*, 539 U.S. at 132. Rather, the burden is on the inmates to show that the rule serves no legitimate penological purpose. *See id.*

It is thus immaterial that the State produced no affidavits establishing the effectiveness of the prohibition in inducing

inmates to modify their behavior. And the court of appeals' belief that its "insistence that the DOC offer some evidence is not . . . at odds with *Turner* but rather a complementary part of the analysis in determining whether an asserted goal is logically connected to the prison regulation," Pet. App. 14a n.10, is flatly contradicted by *Overton* and other cases which clearly place the burden on "the prisoner to disprove" the validity of a regulation. *See Overton*, 539 U.S. at 132 (citing *Shaw v. Murphy*, 532 U.S. 223, 232 (2001); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987); *Jones*, 433 U.S. at 128).[3] In short, under the first prong of *Turner*, the State is only required to articulate a plausible justification for its regulation; it has no obligation to produce empirical evidence showing that its regulation is effective. Thus, the purported "paucity of any such evidence" proving the effectiveness of the LTSU prohibition in "achiev[ing] its stated rehabilitative purpose," Pet. App. 14a n.10, is of no legal consequence.[4]

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[3] Further demonstrating its fundamental misunderstanding of this Court's prisoners' rights jurisprudence, the court of appeals faulted the district court because it "did not examine the fit between the policy and its rehabilitative goals, whether the ban was implemented in a way that could modify behavior, or inquire into whether the DOC's deprivation theory of behavior modification had any basis in real human psychology, or had proven effective with LTSU inmates." Pet. App. 13a. These criticisms find no support in this Court's cases. They reflect heightened scrutiny, an approach incompatible with *Turner* and its progeny. *See, e.g.*, *Shaw*, 532 U.S. at 230 ("[U]nder *Turner* . . . prison officials are to remain the primary arbiters of the problems that arise in prison management."); *see also id.* at 232 ("To prevail, [a prisoner] must overcome the presumption that the prison officials acted within their broad discretion.") (internal quotation and citation omitted).

[4] At the time of Deputy Superintendent Dickson's deposition, 10 inmates had "graduated" from the LTSU and been transferred to other institutions, Opp. App. 95 (Dickson Dep. 27), and three inmates had been promoted to Level I. *Id.* at 93 (Dickson Dep. 17). Considering that "the main reasons for an inmate to come to the LTSU" include an inmate's having failed to complete the Special Management Unit, *id.* at 95 (Dick-

That the State's LTSU policy "has a 'valid, rational connection' to a legitimate governmental interest," *Overton*, 539 U.S. at 132 (citation omitted), is established by the court of appeals' acknowledgment "that deterrence of future infractions of prison rules can be an appropriate justification for temporarily restricting the rights of inmates." Pet. App. 11a. Indeed, as a general matter it is rational to believe that denying privileges to troublesome inmates will induce them to modify their behavior and obey prison rules whether or not their initial assignment to LTSU Level 2 is for a fixed or indeterminate duration.

Relatedly, the LTSU policy has a valid, rational connection to the State's legitimate penological interest in obtaining compliance with prison rules for another reason. The policy serves as an incentive to those inmates who are not in the LTSU—whether they are in the general population or one of the other units used to manage difficult inmates—to behave or suffer the loss of privileges. As the dissenting judge below explained: "It is 'rational' for corrections officials to think that inmates who are not in Level 2 will be deterred from engaging in serious misconduct because they do not want to be transferred to that unit and thus . . . be subjected to the restrictions that accompany that assignment." *Id.* at 26a-27a (Alito, J., dissenting). The court of appeals, however, failed to recognize this "self-evident connection to the State's interest in maintaining prison security" and order. *Overton*, 539 U.S. at 133.

Ignoring this alternative interest served by the LTSU rule, the court of appeals apparently found persuasive respondent's contention that "isolating prisoners from the going[s]-on in

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son Dep. 28), a form of disciplinary segregation that is not as severe as the LTSU, there is—contrary to the view of the court of appeals—substantial evidence that the LTSU policy induces troublesome inmates to modify their behavior.

the outside world tends to undercut any genuine rehabilitation." Pet. App. 13a. Notwithstanding that there was "no evidence in the record on this point," and that respondent had only "cite[d] to language in several cases," the court speculated that "[i]t certainly seems relevant to the . . . inquiry, as well as likely, that the ban *may produce* less rather than more compliance in at least some inmates." *Id.* at 13a-14a (emphasis added). *See also id.* at 13a n.9 (asserting that "[r]ehabilitative goals are 'furthered by efforts to inform and educate inmates, and foster their involvement in the world outside the prison gates'") (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1034 (2d Cir. 1985)).

This reasoning refutes any claim that the court of appeals adhered to the principles of *Turner* and its progeny. While *Overton* makes clear that the prisoners bear the burden of proving—with evidence—the invalidity of a regulation, the court of appeals rejected the State's justification not on the basis of evidence but based purely on its own speculation that the LTSU policy does not work. The snippets from judicial opinions cited by the court of appeals, *see id.* at 13a n.9, do not establish that the LTSU policy lacks a rational connection to a legitimate penological interest. The court of appeals' reliance on them is a transparent attempt to impose its own judgment as to what constitutes a valid penological goal.

Indeed, the court of appeals' invocation of these passages demonstrates the soundness of this Court's long-standing directive that federal "courts should ordinarily defer to [the] expert judgments" of state prison administrators in setting penological policies. *Pell*, 417 U.S. at 827. Two of the cases—*Abdul Wali* and *Morrison v. Hall*, 261 F.3d 896 (9th Cir. 2001)—involved First Amendment restrictions on prisoners in the general population. Tellingly, although the court of appeals in this case faulted Pennsylvania for failing to produce evidence that the LTSU rule would achieve its stated purpose, Pet. App. 14a n.10, in *Abdul Wali* the Second Circuit

cited no evidence in support of its assertions as to what constitute proper penological goals. *See* 754 F.2d at 1033-34. And in *Morrison* the Ninth Circuit relied on two newspaper articles to support its holding, reasoning that there is a "'correlation between reading, writing and inmate rehabilitation.'" 261 F.3d at 904 n.7 (citation omitted) (quoted at Pet. App. 13a n.9).[5]

Thus, the conclusion that "isolating prisoners from the going[s]-on in the outside world tends to undercut any genuine rehabilitation," Pet. App. 13a, which the court of appeals found both "relevant" to the *Turner* prong-one inquiry and "likely" as a factual matter, is without foundation. *Id.* at 13a-14a. And even if there is a "correlation between reading, writing and inmate rehabilitation," *id.* at 13a n.9 (citation omitted), the State allows Level 2 prisoners to read books and write letters. *See* Opp. App. 77a. In any event, the court of appeals' conclusion says nothing about the strength of the correlation and whether the proposition holds true for all 42,000 inmates in Pennsylvania's prison system. *See* Pennsylvania Dep't of Corrections, Monthly Population Report As of Nov. 30, 2005 <available at http://www.cor.state.pa.us/portal/lib/portal/monthly_population.pdf>.

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[5] The court of appeals also noted that in a case involving the Alabama prison system "there was testimony that deprivation of reading materials in segregation can cause 'psychological deterioration' which in turn can cause inmates either to be 'very withdrawn and curl up in infancy, or [to] become acting out and aggressive people.'" Pet. App. 13a n.9 (quoting *Spellman v. Hopper*, 95 F. Supp.2d 1267, 1281 (M.D. Ala. 1999)).

There is, however, "no evidence in the record on this point." *Id.* Nor is this assertion a proper subject for judicial notice. *See* Fed. R. Evid. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute[.]"). In any event, Level 2 inmates are allowed to obtain books from the library. *See* Pet. App. 14a.

The inmates assigned to the LTSU comprise one tenth of one percent of Pennsylvania's state prison population. Pet. App. 25a (Alito, J., dissenting). They are—as the magistrate judge found—"'the most incorrigible, the most difficult, [and] problematic'" of all the prisoners in the state system "'and have demonstrated the most behavior conflicts.'" Pet. App. 34a-35a (Op. Mag. J.) (citation omitted); *see also* Pet. App. 25a (Alito, J., dissenting). "Indeed, [inmates] are in the LTSU because efforts in other units [where they had access to newspapers and magazines] failed." *Id.* at 40a (Op. Mag. J.). Moreover, some inmates may have committed crimes of such a serious nature and received such lengthy sentences (e.g., life) that they have no interest in rehabilitation as the court of appeals has redefined that term. And in the unique culture of prisons, some inmates may take special pride in being intractable and disruptive. *Cf.* Emma Clare *et al.*, Gov't of the U.K., Home Office Research, Development and Statistics Directorate, *Evaluation of Close Supervision Centres* 52 (2001) ("[G]iven the nature of the prison environment and culture . . . there are many pressures operating on prisoners to maintain their disruptive behaviour.").

"The question of what motivates disruptive prisoners is extraordinarily complex[.]" *Id.* at 123 (Appendix A). Determining what measures are necessary to induce LTSU inmates to modify their behavior is a matter which is manifestly within the expertise of prison administrators and not federal judges. In substituting its own judgment for that of Pennsylvania's prison administrators as to what constitute valid penological goals, the court of appeals failed to accord proper deference to the State's officials and thus violated the fundamental teaching that "prison officials are to remain the

primary arbiters of the problems that arise in prison management." *Shaw*, 532 U.S. at 230 (citing *Turner*, 482 U.S. at 89).[6]

2. *LTSU Inmates Have Sufficient Alternative Means of Exercising Their First Amendment Rights*

Turner's second factor "is whether there are alternative means of exercising the right that remain open to prison inmates." 482 U.S. at 90. As *Turner* explains, "[w]here 'other avenues' remain available for the exercise of the asserted right, *Jones*, 433 U.S. at 131, courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'" 482 U.S. at 90 (quoting *Pell*, 417 U.S. at 827).

The court of appeals apparently accepted respondent's argument "that while Level 2 inmates can read leisure books, they have no meaningful access to current news accounts or published information about current political, social, or other public events and activities occurring outside the prison walls." Pet. App. 19a. Likewise, "they have no way to look

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[6] The court of appeals also rejected the State's contention that the prohibition serves a legitimate penological interest because the proscribed reading materials could potentially be used as weapons or to start fires. *See* Pet. App. 14a-18a. Here, too, the court ignored the self-evident connection between the rule and the State's penological interests and instead subjected the State's justification to heightened scrutiny. *See, e.g.*, *id.* at 16a ("[W]e agree with Banks that given the materials Level 2 inmates are permitted in their cells, prohibiting a single newspaper or magazine has no *significant* relationship to the stated security objectives.) (emphasis added).

As explained above, *Turner* and its progeny only require a rational relationship. *See* 482 U.S. at 89-90. Moreover, the court's approach is counterproductive to the interests of prisoners. If a State cannot ban items for security reasons because it allows inmates to possess other items that can also be used for improper purposes, States would have an incentive to impose even greater restrictions on inmates' possessions.

at images of loved ones and friends apart from the possibility of infrequent visits." *Id.*

The court of appeals reasoned that the LTSU rule was a "blanket" prohibition and "that as long as an inmate is at Level 2 status and is subject to the policy in question, he has no alternative means to exercise his First Amendment right of access to a reasonable amount of newspapers, magazines, and photographs." Pet. App. 19a-20a. While acknowledging that Level 2 inmates can gain access to the prohibited materials by behaving and thereby getting promoted out of the LTSU, the court apparently found this insufficient because "segregation in Level 2 is not linked to a particular infraction, and is of potentially unlimited duration." *Id.* at 20a. The court apparently was also concerned with the adequacy of the process for reviewing Level 2 status. *See id.* ("There are no affidavits in the record from any of those decision-makers mentioned by Dickson, nor is there any documentation of the review process."). The court thus concluded that "the LTSU prohibition cannot be characterized as merely a 'time, place or manner' restriction." *Id.* at 21a. (citation omitted).

The court's reasoning reflects a fundamental misunderstanding of this Court's prisoner rights cases. *Turner* itself rejects the notion that the Court's "time, place, or manner" jurisprudence is pertinent in evaluating prison regulations that implicate First Amendment rights. *See* 482 U.S. at 87-88. Indeed, it is strange to apply a doctrine whose purpose is to assess the validity of governmental regulation of speech in a *public forum* to the regulation of speech in prison.

True enough, *Pell v. Procunier* cited several time, place and manner cases. *See* 417 U.S. at 826. But as *Turner* observed, the regulation at issue in *Pell* was not "a 'time, place, or manner' restriction in any ordinary sense of the term." 482 U.S. at 88. Thus, while *Pell* recognized that "the alternative methods of personal communication still available to prisoners would have been 'unimpressive' if offered to

justify a restriction on personal communication among members of the general public . . . . [T]hey were relevant in determining the scope of the burden placed by the regulation on inmates' First Amendment rights." *Id.* at 88 (quoting *Pell*, 417 U.S. at 825).

While the burden imposed on Level 2 inmates' First Amendment rights is not insignificant—otherwise it would serve no penological purpose—Level 2 inmates retain substantial First Amendment rights. For instance, they can engage in expressive activity by writing letters. Moreover, they can obtain books from the prison library.

Level 2 inmates also have several alternative means of obtaining access to information about political and social events. While they cannot receive news clippings unless they relate to them or their families, they can receive personal correspondence. *See* Opp. App. 77. The LTSU rule does not prevent an inmate from requesting that family members include within their letters a discussion of current events. *See* Pet. App. 28a (Alito, J. dissenting); *id.* at 41a-42a (Op. Mag. J.). Similarly, inmates can also receive information regarding news events during their monthly visits with family members. *See id.* at 41a-42a. The court of appeals ignored these alternatives.

Furthermore, as the district court found, Level 2 prisoners can obtain newspapers and magazines by modifying their behavior and gaining promotion to Level 1. *See id.* at 41a; *see also id.* at 28a (Alito, J., dissenting). The court of appeals, however, rejected this alternative, explaining that Level 2 segregation "is not linked to a particular infraction, and is of potentially unlimited duration." *Id.* at 20a.[7]

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[7] Under almost all of the criteria that render an inmate subject to transfer to the LTSU, *see* Pet. App. 3a n.2, "particular infraction[s]" are relevant. *Id.* at 20a. For example, "engaging in facility disturbances" or "assaultive behavior with the intent to cause death or serious bodily

This aspect of the program does not, however, present a First Amendment question. Indeed, the court's reasoning ignores that the duration of the prohibition is within each inmate's power to control. And even if this feature of the program were relevant in determining the validity of the rule, once again the court of appeals failed to follow this Court's *Overton* holding.[8]

3. *Respondent's Proposed Accommodations Would Have A Substantial Impact On Prison Management And There Are No Ready Alternatives*

Under *Turner*'s third and fourth prongs, a court must consider "'the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally,' and 'the absence of ready alternatives' available to the prison for achieving the governmental objectives." *Shaw*, 532 U.S. at 230 (quoting *Turner*, 482 U.S. at 90). The Court has recognized that "[i]n the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order." *Turner*, 482 U.S. at 90. The Court has further made clear that *Turner*'s fourth prong "is

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injury" would seem to clearly involve a particular infraction. Moreover, none of the plaintiffs have alleged that their assignment to the LTSU was not based on a particular infraction or that they have been improperly kept in Level 2 status. *See* Opp. App. 1a-10a (Complaint).

[8] That "[t]here are no affidavits in the record from any of those decision-makers" on the unit management team, *id.* at 20a, the lack of "any documentation of the review process," *id.*, and the absence of any documents in the record "which indicated, with respect to current LTSU inmates, how long they had been at the facility and how long they had been at Level 2," *id.* at 20a-21a, are evidentiary matters which respondent had the burden of proving. *See Overton*, 539 U.S. at 132. There was thus no evidentiary basis for the court of appeals to rule against the State on the second *Turner* prong.

not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.* at 90-91 (citation omitted). If, however, a prisoner "can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91.

The court of appeals accepted respondent's contention that there were two alternative policies which could accommodate inmates' rights with minimal impact on prison resources and safety. *See* Pet. App. 22a-23a. According to the court, the State "could establish a specific reading period, or several different reading periods, in which guards deliver a single newspaper or magazine to an inmate's cell, if requested, and retrieve it at the close of the period." *Id.* at 22a. In the court's view, "[e]ven if limited distribution of periodicals were to require additional monitoring, such an accommodation would have a minimal impact on prison resources." *Id.* at 23a.

The court also accepted respondent's suggestion that inmates "could be escorted to the secure mini-law library to read a periodical of their choosing." *Id.* at 23a. The court reasoned that "[i]nmates are already permitted to leave their cells under guard escort to use the library to view legal materials, so individual inmate escort has not been deemed prohibitively burdensome or dangerous by prison administrators." *Id.* at 23a-24a.

In analyzing these alternatives, the court of appeals again substituted its own judgment for that of the State's prison administrators and misapplied the *Turner* standard. The court did pay lip service to the fact that "Level 2 inmates are some of the most 'intractable' in the Pennsylvania prison system." *Id.* at 22a. The court ignored, however, the fundamental fact

that both alternatives would result in an increase in the number of interactions between guards and inmates and thus raise the potential number of security incidents.

For example, under the first alternative, the guards would still have to retrieve the newspaper at the end of the reading period at which time an inmate could use it to commit an assault. *See* Pet. App. 45a (Op. Mag. J.). In addition, given the troublesome nature of Level 2 inmates, it is reasonable to believe that on occasion some might refuse to return the newspaper, thus creating the potential for a confrontation between themselves and the guards and raising the possibility of injury to either the inmate or the guards.

While the court of appeals acknowledged that those inmates who "abuse[] their use of periodicals," *id.* at 23a, could thus have their "access to periodicals . . . be entirely withheld," *id.* at 22a, the court's rule would allow Level 2 inmates at least one opportunity to misuse them.[9] Moreover, even the court acknowledged that it would "require additional monitoring," *id.*, *i.e.*, that more guards would have to be assigned to the LTSU. Thus, contrary to the views of the court below, this alternative would have more than a *de minimis* impact on prison resources.

The alternative of escorting prisoners to the mini-law library is equally problematic. While the court of appeals admitted that "it is possible that the *demand* for mini-law library sessions may increase if the policy were changed," the court faulted the State for failing show "how this would significantly increase the burden on prison staff." *Id.* at 24a. It is obvious, however, that prisoner demand for library visits

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[9] The court of appeals also suggested that access to newspapers "could be entirely withheld from those individual prisoners who, in the judgment of prison officials, *would* pose a particular risk given their records." Pet. App. 22a-23a. Pennsylvania's officials have, however, already made this finding when determining that an inmate should be placed in Level 2.

would increase substantially for the reason that being able to look at newspapers and magazines would reduce the harshness of LTSU confinement. While the court of appeals "fail[ed] to see how the mere addition of non-legal and non-religious periodicals to the materials already available to the inmates in the library" would burden the State, *id.*, it is rational to believe that many prisoners would find newspapers and magazines more entertaining than the Federal Reporter series and would be sure to demand every visit that the DOC's regulations entitle them to. This alternative would thus clearly result in substantial additional burdens on the prison system.[10]

Finally, the court of appeals rejected the district court's conclusion that the prisoners' alternatives would impose "more than a *de minimus* [sic] cost to the DOC's behavior modification goals because the accessibility of periodicals would render the threat of Level 2 segregation toothless as a deterrent." Pet. App.25a. In this regard, the court of appeals reasoned that "even without the challenged restriction, Level 2 . . . segregation is more restrictive than Level 1 in significant respects." *Id.*

The scope of restrictions necessary to induce Level 2 inmates to modify their behavior is, however, a matter which is uniquely within the expertise of prison administrators and not federal judges to decide. The court of appeals disregarded this Court's admonition that federal courts are not to "become the primary arbiters of what constitutes the best solution to" the problems that arise in running prisons.

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[10] *Cf.* Chase Riveland, U.S. Dep't of Justice, *Supermax Prisons: Overview and General Considerations* 9 (1999) ("The number of staff required to move each inmate from a cell to the exercise space and back three to seven times each week is considerable. As these events also constitute the most frequent time that the inmate is out of his/her cell, they also present the most likely opportunity for resistive or combative behavior or the exchange or introduction of contraband.").

Turner, 482 U.S. at 89. In this and numerous other ways discussed above, the court of appeals' reasoning squarely conflicts with this Court's teachings.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JEFFREY BEARD,

Petitioner,

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v.

RONALD BANKS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR LUMUMBA KENYATTA INCUMAA AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a state is entitled to summary judgment upholding a prison policy that denies newspapers, magazines, and photographs to certain inmates, where the state: (1) baldly asserts that the policy will deter certain inmates from violating prison rules, will prevent fire, will reduce contraband, and will increase security; (2) fails to articulate any valid and rational connection between the policy and its asserted justification; and (3) fails to submit any evidence to establish that the policy actually furthers these interests.

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INTEREST OF MR. INCUMAA[1]

Lumumba Kenyatta Incumaa, an inmate incarcerated in South Carolina state prison, is the plaintiff in *Incumaa v. Ozmint*, pending before the United States Court of Appeals for the Fourth Circuit.[2] On August 29, 2003, Mr. Incumaa, *pro se*, filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the District of South Carolina against Jon Ozmint, in his official capacity as Director of the South Carolina Department of Corrections ("the Director"). Mr. Incumaa has challenged South Carolina Department of Corrections Policy/ Procedure OP-22.11:

> **13.1** MSU inmates may continue to receive periodical subscriptions that were purchased and paid for prior to their admission to MSU until the subscription expires, but will only be allowed to have in their possession the number of paperback books or periodicals authorized in paragraph 14, below. ***No subscriptions may be renewed.***
>
> **13.2** ***No new periodical subscriptions or purchases of books, publications, or magazines will be approved after the inmate's admission to MSU. MSU inmates will not be allowed to receive any free books, periodicals, publications, or magazines in their correspondence.***

OP-22.11 (emphases in original). Specifically, Mr. Incumaa claims that this policy, which substantially bars inmates housed

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1. Neither party in this case nor their counsel authored this brief in whole or in part, and no person or entity other than *amicus curiae* and his counsel made any monetary contribution to its preparation or submission. The parties' written consent, pursuant to Supreme Court Rule 37, is attached hereto.

2. Docket No. 04-7824.

in that state's "Maximum Security Unit" from receiving books, magazines, or other publications in the mail, violates the First and Fourteenth Amendments to the United States Constitution.

On October 26, 2004, the district court granted the Director's motion for summary judgment, based on arguments similar to those advanced by the Petitioner here.[3] Mr. Incumaa appealed.

On April 15, 2005, the Fourth Circuit appointed undersigned counsel to represent Mr. Incumaa. Mr. Incumaa has submitted his opening brief in the Fourth Circuit.

STATEMENT OF THE CASE

Inmates in the Long Term Segregation Unit ("LTSU") "Level 2" of the Pennsylvania Department of Corrections ("DOC") are subject to a "total prohibition" on possession of "secular newspapers or magazines." Joint Appendix ("J.A.") at 26-27. They have "no access to the newspapers and magazines in the prison library." *Id.* "Nor can they receive news clippings or articles in the mail unless they have a personal nexus" to the inmate. *Id.* All LTSU inmates are also prohibited from possessing photographs of family members or loved ones. *Id.*

On October 18, 2001, Ronald Banks ("Mr. Banks" or "Respondent"), a Level 2 LTSU inmate, sued Jeffrey Beard, in his official capacity as Secretary of the DOC ("DOC" or "Petitioner"), seeking injunctive and declaratory relief under 42 U.S.C. § 1983. J.A. at 1. Mr. Banks claimed that the ban on newspapers, magazines, and photographs violates the Free Speech Clause of the First Amendment to the United States Constitution. *Id.* at 17.

3. In several respects not discussed here, OP-22.11 is more restrictive, both on its face and as applied to Mr. Incumaa, than the prohibition at issue here.

According to DOC, the "primary, most important purpose" of the ban on newspapers, magazines, and photographs is "behavior motivation." *Id.* at 27. In other words, "it provides the Level 2 inmates with the prospect of earning a privilege" and serves as a deterrent to inmates outside of Level 2 who are not subject to the prohibition. *Id.* A "secondary purpose," officials explain, is that if inmates have "less property," it is "easier . . . for the unit's correctional officer to detect concealed contraband." *Id.* Finally, officials assert that "newspapers and magazines can be used as weapons, . . . or employed as tools to catapult feces at the guards without the necessity of soiling ones own hands and as tinder for cell fires." *Id.*

Following class certification and discovery,[4] the parties cross-moved for summary judgment. *Id.* at 4. The district court granted summary judgment in favor of DOC, holding that the prohibitions were rationally related to DOC's penological interests in rehabilitation and security. *Banks v. Beard*, 399 F.3d 134, 138 (3d Cir. 2005).

Mr. Banks then appealed to the United States Court of Appeals for the Third Circuit. J.A. at 7. The Third Circuit analyzed Mr. Banks's claims under the framework set forth in *Turner v. Safley*, 482 U.S. 78, 89 (1987), which held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *See Banks*, 399 F.3d at 139-48. This test weighs four factors: (1) the validity and rationality of the connection between the restriction and the asserted penological interest; (2) the availability of

4. The district court certified a class comprising all prisoners within the Western District of Pennsylvania who are or will be confined within Level 2 of the LTSU. J.A. at 3.

alternative means for exercising the implicated right; (3) the impact of accommodating that right; and (4) the existence of obvious alternatives for achieving the asserted penological goal. *Turner*, 482 U.S. at 89-90.

With respect to the first factor, the Third Circuit agreed generally that "[c]ertainly 'deterrence of future infractions of prison rules' is a legitimate penological interest." *Banks*, 399 F.3d at 140. It concluded, however, that the behavioral modification justification offered by DOC was "illogical given the nature of LTSU confinement." *Id.* at 141. The court next concluded that DOC's fire, contraband, and security justifications were also unsupported by common sense or evidence. *Id.* at 142-44.

The Third Circuit then examined the other *Turner* factors and determined that each of them supported the claims by Mr. Banks. *Id.* at 144-48. Justice Alito, then sitting on the United States Court of Appeals for the Third Circuit, dissented, arguing that the majority had placed an improper evidentiary burden on the government. *See id.* at 148-50. But the majority countered that its evidentiary inquiry was a complementary part of its *Turner* analysis:

> [O]ur insistence that the DOC offer some evidence is not, in our view, at odds with *Turner* but rather a complementary part of the analysis in determining whether an asserted goal is logically connected to the prison regulation. *See Turner*, 482 U.S. at 89 (requiring prison authorities to put forward a legitimate governmental interest justifying the regulation). Indeed, in *Turner*, the Supreme Court evaluated the evidence in determining whether the prison rules in question served - in theory or in practice - the alleged

> penological goals. *See id.* at 91-93, 98-99. In our view, the paucity of any such evidence in this matter reinforces the conclusion that there is no valid, rational connection between the DOC rule and its stated rehabilitative purpose.

Banks, 399 F.3d at 142 n.10. Based on this analysis, the Third Circuit reversed the district court's grant of summary judgment for DOC and remanded the case for further proceedings. *Id.* at 148.

SUMMARY OF ARGUMENT

DOC's assertion of entitlement to deference from this Court begins rather than ends the central inquiry in this case. Indeed, no one disputes that federal courts should "accord substantial deference to the professional judgment of prison administrators." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). However, courts must balance this deference with the need to protect prisoners' constitutional rights under a standard that "is not toothless." *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989); *see Washington v. Harper*, 494 U.S. 210, 223 (1990) (discussing "need to reconcile" protection of prisoners' rights with need for deference). In this case, the Court must decide the proper allocation of burdens where, as here, the government has made a motion for summary judgment without any evidentiary support for the nexus between its penological justifications and its restrictions on prisoners' constitutional rights. The Third Circuit concluded that, under those circumstances, the government was not entitled to summary judgment. As explained below, this Court should affirm the judgment of the court of appeals.

Petitioner's primary justification for the ban on possession of newspapers, magazines, and photographs in

LTSU Level 2 is the bald assertion that the ban will induce the worst inmates in the Pennsylvania corrections system to behave. In other words, because this categorical restriction on newspapers, magazines, and photographs makes LTSU Level 2 a less desirable place to live, inmates in the general population and special management units, who might otherwise commit terrible offenses in prison and who have proven undeterrable by any other means, might be dissuaded from breaking prison rules. By the same logic, DOC predicts that inmates committed to LTSU Level 2 will be motivated to obey the prison rules in order to be promoted to an environment with a larger selection of reading materials.

However, under *Turner v. Safley*, 482 U.S. 78 (1987), an unadorned assertion that a restriction will make a facility less desirable is not sufficient to establish the "validity" and "rationality" of the connection between the restriction and the asserted penological interest. *See id.* at 89. Were that sufficient, virtually any restriction would satisfy the standard. *Turner* requires more than superficial plausibility – it requires sound logic and some basis in fact. Thus, this Court should affirm the judgment of the court of appeals, which properly required under these circumstances that DOC demonstrate the connection based on evidence.

ARGUMENT

It is "well established that the [First Amendment to the U.S.] Constitution protects the right to receive information and ideas." *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (internal quotation marks omitted). Incarcerated persons retain that right, which includes reasonable access to books and periodicals. *See, e.g., Thornburgh*, 490 U.S. at 409-11 & n.9. In the corrections context, the Court has insisted that "[t]here must be a mutual accommodation between

institutional needs and objectives and the provisions of the Constitution that are of general application." *Bell v. Wolfish*, 441 U.S. 520, 546 (1979).

In *Turner v. Safley*, this Court formulated "a standard of review for prisoners' constitutional claims that is responsive *both* to the 'policy of judicial restraint regarding prisoner complaints *and* [to] the need to protect constitutional rights.'" 482 U.S. at 85 (quoting *Procunier v. Martinez*, 416 U.S. 396, 406 (1974)) (emphases added). *First*, "there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* at 89 (internal quotation marks omitted). *Second*, a court should consider "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. *Third*, a court should consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* *Finally*, "the existence of obvious, easy alternatives" to the regulation "may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.*

But these principles do not answer the question presented: Is a state entitled to judgment as a matter of law upholding a prison restriction that bars the exercise of a core constitutional right if the state's only real justification for the restriction is a bald assertion that it will make part of the prison less attractive for inmates? The Third Circuit correctly applied all four *Turner* factors in a manner consistent with this Court's precedent and held that under these circumstances a state needs to submit *some* evidence in support of its justifications.

I. *TURNER* REQUIRES EITHER AN OBVIOUSLY VALID AND RATIONAL NEXUS BETWEEN RESTRICTIONS OF RIGHTS AND THE ASSERTED PENOLOGICAL INTERESTS OR, ALTERNATIVELY, EVIDENCE OF A CONNECTION.

A. *Turner* Requires More Than Bald Assertions That A Restriction Will Prevent Bad Behavior.

The *Turner* test first requires that courts examine whether the means-ends connection asserted by prison administrators is both "valid" and "rational." *See* 482 U.S. at 89. "Valid" and "rational" are not synonyms. Webster's defines "rational" as "based on reason." *Webster's Third New International Dictionary* 1885 (1986). By contrast, "valid" is defined as "able to effect or accomplish what is designed or intended," "strong," and "founded on an adequate basis." *Id.* at 2529-30. Thus, while logic alone can satisfy the *Turner* requirement that the connection be "rational," "validity" of the connection requires some basis in fact. *Cf. Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (proponent of expert testimony must establish a "'valid . . . connection'" to trial issue based on "factual basis, data, principles, methods, or their application").

Turner itself illustrated how courts are to apply the "valid" and "rational" components of the first *Turner* factor. There, the State of Missouri sought to justify an "almost complete ban" on prisoner marriages by asserting a security need to prevent "love triangles" and a rehabilitation interest in engendering self-reliance among female prisoners. *See* 482 U.S. at 97-98. The Court observed that "[c]ommon sense" did not establish as a matter of law a connection between the marriage restrictions and the prevention of "love triangles," *id.* at 98, and it questioned the logic of the connection to

rehabilitation. *Id.* Requiring something more persuasive, the Court scoured the trial record for evidence of a connection. *See id.* at 97-99. But it found that evidence insufficient and, therefore, struck down the offending regulation. *See id.* at 97 ("We conclude that on this record, the Missouri prison regulation, as written, is not reasonably related to these penological interests."); *id.* at 98 ("We are aware of no place in the record. . . ."); *id.* ("Nor, on this record, is the marriage restriction reasonably related to the articulated rehabilitation goal."); *id.* at 99 ("On this record . . . the almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives."). This Court held that the marriage restriction swept "much more broadly," both logically and empirically, than could "be explained by [the government's] penological objectives." *Id.* at 98. By contrast, the Court concluded that Missouri's other challenged regulation – a ban on inmate-to-inmate correspondence – was "logically connected to" the state's articulated "legitimate security concerns" and also that "the *record clearly demonstrate[d]* that the regulation was reasonably related" to those interests. *Id.* at 91 (emphasis added).[5]

Petitioner is, therefore, only partially correct in its assertion that *Turner* requires a "'logical connection between the regulation and the asserted goal.'" Brief for Petitioner ("Pet. Br.") at 26. If such a connection is absent, Petitioner is correct that the restriction cannot stand. *See* 482 U.S. at 89-90 ("a regulation *cannot be sustained* where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational" (emphasis added)). However, *Turner* did not hold, as

5. Note that *Turner* reached the Supreme Court following a trial, and that the well-developed factual record informed the Court's discussion throughout. 482 U.S. at 82; *see generally id.* at 91-99.

Petitioner claims, that "prison officials need not produce evidentiary proof" in any case in which a regulation is challenged. A court also must determine whether the connection is "valid." *Id.* at 89.

Indeed, only in cases where the connection between regulation and penological interest has been obviously rational and valid has this Court required no evidence of the connection from the state. *See Harper*, 494 U.S. at 226 (noting "little dispute in the psychiatric profession that proper use of the drugs is one of the most effective means of treating and controlling a mental illness likely to cause violent behavior");[6] *Block v. Rutherford*, 468 U.S. 576, 586 (1984) ("That there is a valid, rational connection between a ban on contact visits and internal security of a detention facility is too obvious to warrant extended discussion."); *Wolfish*, 441 U.S. at 550-51 ("It hardly needs to be emphasized that hardback books are especially serviceable for smuggling contraband. . . .").

Overton v. Bazzetta is entirely consistent with this analysis. In *Overton*, this Court upheld Michigan's rule restricting certain prisoners from having, among other things, certain children visit them in prison, because Michigan's stated goals were obviously valid and rational and supported by persuasive evidence. 539 U.S. at 133 (connection was "demonstrated by trial testimony."); *see also id.* at 129-30 (detailing evidentiary record supporting the government's case). This Court held that, on the extensive factual record before it, the prisoners in *Overton* failed to carry their burden of showing the invalidity of the connection at trial. *Id.* at 132. *Overton* did not involve a motion by the

6. Like *Turner*, the *Harper* decision also followed a trial, which provided much of the basis for the Court's analysis in that case. *See* 494 U.S. at 217.

government for judgment as a matter of law and did not speak to the Petitioner's contention here that it has no burden of *production* in support of its motion. The Court's statement in that case that the burden "is not on the State to prove the validity of prison regulations," *id.*, referred to the burden of persuasion at trial. *Id.* at 133. Nothing in that case or any other precedent of this Court required the courts below to grant DOC's summary judgment motion in this case on the basis of its assertions alone.

B. Applying *Turner*, Courts of Appeals Have Required That The Connection To The Penological Goal Be A Matter of "Common Sense."

Courts of appeals, applying *Turner*, have carefully applied this Court's requirement that the nexus between the restriction and asserted penological interest be both valid and rational. Thus, the courts of appeals for the Second, Third, Ninth, and D.C. Circuits have followed an approach whereby if, and only if, the asserted connection is a matter of "common sense," the government need not submit evidence in support of the nexus. *See Walker v. Gomez*, 370 F.3d 969, 975 n.7 (9th Cir. 2004) (explaining burdens); *Waterman v. Farmer*, 183 F.3d 208, 217 (3d Cir. 1999) (Alito, J.) (prohibition on pornography bore common sense connection to rehabilitation of sex offenders); *Amatel v. Reno*, 156 F.3d 192, 199 (D.C. Cir. 1998) (same); *Giano v. Senkowski*, 54 F.3d 1050, 1055 (2d Cir. 1995) (affirming summary judgment upholding prison policy). If, however, the connection is not conclusively established by common sense, the government must support its restriction on constitutional rights with evidence. *See Jacklovich v. Simmons*, 392 F.3d 420, 429 (10th Cir. 2004) (rejecting unsupported contention that "a four-month complete denial of access to constitutionally protected materials . . . furthers behavior management or rehabilitation"); *Shakur v. Selsky*, 391 F.3d 106, 115 & n.4 (2d Cir. 2004) (vacating dismissal); *Gomez*, 370 F.3d at 975 n.7 (explaining that prisoners

bear a "light" burden of rebutting common-sense of connection); *Asker v. Cal. Dep't of Corr.*, 350 F.3d 917, 922-23 (9th Cir. 2003) (affirming summary judgment for prisoner); *Wolf v. Ashcroft*, 297 F.3d 305, 308-09 (3d Cir. 2002) (vacating judgment on the pleadings).

"Common sense" in this context has meant something more than "plausible" or "reasonable." In *Wolf v. Ashcroft*, the Third Circuit explained that the standard is "obviousness." 297 F.3d at 308-09. For example:

> A prohibition on inmate gatherings in prison common areas after 11-o'clock at night might have an obvious relationship to security concerns, as would a prohibition on publications that featured escape plans, *Amatel*, 156 F.3d at 206 (Wald, J., dissenting), or instructions on assembling weapons, *Giano v. Senkowski*, 54 F.3d 1050, 1059-60 (2d Cir. 1995) (Calabresi, J., dissenting). Likewise, the connection between the goal of rehabilitation and a ban on distributing sexually explicit magazines to "repetitive and compulsive" sexual offenders may well be . . . sufficiently obvious to be evaluated as a matter of common sense.

Wolf, 297 F.3d at 309. On the other hand, the government's assertion in that case that a prohibition on movies rated R or NC-17 in prison deters the general public from committing crimes was not so compelling as to be "a matter of common sense." *Id.* at 309; *see also Ramirez v. Pugh*, 379 F.3d 122, 129 (3d Cir. 2004) (common sense did not establish a connection between ban on publications featuring nudity and rehabilitation of non-sex offenders).

In these *Turner*-related cases, one theme has been clear: courts of appeals have been reluctant to credit unadorned

justifications by prison authorities in support of restrictions burdening constitutional rights. *See, e.g., Shimer v. Washington*, 100 F.3d 506, 510 (7th Cir. 1996) (in the absence of evidence, the court is "reduced to speculation"); *Whitney v. Brown*, 882 F.2d 1068, 1074 (6th Cir. 1989) ("prison officials do not set constitutional standards by fiat"); *Williams v. Lane*, 851 F.2d 867, 886 (7th Cir. 1988) (Flaum, J., concurring in the result) (administrators may not "avoid court scrutiny by reflexive, rote assertions that existing conditions are dictated by security concerns").

C. The Third Circuit's Analysis Is Consistent With This Court's Holdings In Other Circumstances Requiring Deference.

The analysis by the Third Circuit in *Banks* not only follows the consensus developed in the courts of appeals, but also is entirely consistent with this Court's decisions in other similar circumstances.

For example, in the context of federal habeas review of a state court's decision, this Court will defer to the state court unless the decision was contrary to or "*involved an unreasonable application of* . . . clearly established Federal law, as determined by the Supreme Court of the United States." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Using that standard, in *Rompilla v. Beard*, 125 S. Ct. 2456 (2005), the Court undertook a careful analysis of a state's decision in light of the evidence set forth in the habeas petition. *Id.* at 2462-67. The Court overturned the state court's decision on the grounds that it was "objectively unreasonable." *Id.* at 2467.

This Court has performed similar analyses in reviewing administrative actions. Even the most deferential reviews

thereof call for a thorough examination of the analysis performed by the administrative agency. *See Chevron v. Natural Res. Council*, 467 U.S. 837, 844 (1984). In *Chevron*, the Court "recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Id.* The Court went on to explain, however, that federal courts are still charged with the obligation of analyzing the evidence presented in support of the regulation to determine whether the agency's decision was "arbitrary, capricious, or manifestly contrary to the statute." *Id.* In the same context, the Court has also held that "appellate counsel's *post hoc* rationalizations" are entitled to no deference at all. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

Likewise, in the equal protection context, this Court has held that the government's stated interest cannot be taken at face value, but instead there must be a demonstrated connection between the claimed interest and the challenged provision. In *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985), this Court rejected a lower court's articulation of a less deferential standard of review than rational basis, which the lower court had deemed necessary to protect citizens with mental retardation. *Id.* at 437-43. The Court stressed that the use of rational basis review to determine the constitutionality of regulations affecting the mentally retarded "does not leave them entirely unprotected." *Id.* at 446. It then carefully analyzed the state's evidence and held that the record did not establish a sufficient connection between the challenged provision and the government's stated interest. *Id.* at 448 ("Because in our view *the record does not reveal any rational basis* for believing

that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case." (emphasis added)).

In each of these areas of law, in which courts are called upon to defer to the judgment of another entity, this Court has fashioned reviews that are similar to what the courts of appeals have done in *Turner* cases – that is, defer to the entity as long as the judgment is obviously valid and rational, or a matter of common sense, but require proof through evidence if it is not. That is exactly what the Third Circuit did here.

II. DOC HAS NOT ESTABLISHED A VALID AND RATIONAL CONNECTION BETWEEN THE BANS AND THE ASSERTED PENOLOGICAL INTERESTS.

In this case, the Third Circuit explained at length why Pennsylvania's articulated interest was not sufficient as a matter of common sense. For example, because commitment to and release from LTSU Level 2 is "not linked to any particular infraction or compliance," and inmates there "have not all been adjudicated by a hearing officer to have violated the DOC's rules," the court held that "it is unclear how the policy would achieve the deterrence it seeks." *Banks*, 399 F.3d at 141. Finding DOC's explanation illogical and unclear, the court turned to the evidentiary record, where it found "no evidence that the rule achieves or could achieve its stated rehabilitative purpose." *Id.* To the contrary, it observed that, according to some experts, studies, and court opinions, such a "ban may produce less rather than more compliance in at least some inmates":

> Rehabilitative goals are "furthered by efforts to inform and educate inmates, and foster their

> involvement in the world outside the prison gates." *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1034 (2d Cir. 1985). In *Spellman v. Hopper*, there was testimony that deprivation of reading materials in segregation can cause "psychological deterioration" which in turn can cause inmates either to be "very withdrawn and curl up in infancy, or [to] become acting out and aggressive people." 95 F. Supp. 2d at 1281; *see also Morrison v. Hall*, 261 F.3d 896, 904 n.7 (9th Cir. 2001) (citing studies and articles noting the "correlation between reading, writing and inmate rehabilitation").

Banks, 399 F.3d at 142 & n.9.

Next, the Third Circuit held that DOC's fire, contraband, and security justifications were also not established as a matter of law by common sense. *Id.* at 142-44. Particularly in view of DOC's numerous other regulations aimed directly at those potential prison hazards, the connection to the ban on newspapers, magazines, and photos was "too attenuated to be reasonable":

> [G]iven the materials Level 2 inmates are permitted in their cells, prohibiting a single newspaper or magazine has no significant relationship to the stated security objectives. There are many other non-prohibited means for the inmates to fuel fires, hurl waste, conceal contraband and create weapons. Under current regulations, each inmate is given a jumpsuit, a blanket, two bedsheets, a pillow case, a roll of toilet paper, a copy of a prison handbook, ten sheets of writing paper, several envelopes, carbon paper, three pairs of socks, three undershorts and

> three undershirts, and may at any point also have religious newspapers, legal periodicals, a prison library book, Bibles, and a lunch tray with a plate and a cup. Many of these items are flammable, could be used for the above purposes as effectively as a newspaper, magazine or photograph, and have been so used by LTSU Level 2 inmates.

Id. at 143-44; *see also id.* at 142 ("In fact, matches are not allowed in the LTSU."). For those reasons, and because there was "no evidence in the record of the misuse of periodicals or photographs in any of the ways described by the DOC," *id.*, the court concluded that it could not "see how the DOC could reasonably have thought that the challenged policy . . . would meaningfully improve prison security by forbidding" an inmate even a single secular magazine, *id.* at 144.

A. Common Sense Does Not Establish That The Worst Behaved Prisoners In Pennsylvania Will Be Motivated By The Selection Of Reading Material In LTSU Level 2.

This analysis notwithstanding, Petitioner continues to argue that the blackout of non-religious publications "encourages Level 2 inmates to improve their behavior" and "discourag[es] other inmates from behavior that could cause their assignment to Level 2." Pet. Br. at 13. In other words, the publications ban makes life worse in LTSU Level 2, so, logically, prisoners will modify their behavior to avoid the restriction. DOC argues that because this proposition is superficially rational, *Turner* requires the federal courts to defer to its decision-making authority and its expertise. *See id.* at 17.

However, it is difficult to conceive of a restriction of First Amendment rights that would not satisfy the "valid,

rational connection" requirement if all that is necessary is that prison officials assert that the restriction makes conditions more unpleasant for prisoners. The marriage ban struck down in *Turner* would pass that test. So would a blanket ban on family visitation, a ban on religious worship, a ban on speaking English, or a ban on reading or writing anything at all. Lower courts have, therefore, in accordance with this Court's precedent, required more before concluding that governments are entitled to judgment as a matter of law. *See, e.g., Jacklovich*, 392 F.3d at 429 (reversing summary judgment); *Shakur*, 391 F.3d at 115 & n.4 (vacating dismissal); *Ramirez*, 379 F.3d at 129 (same).

Moreover, as Petitioner has explained, LTSU was "designed to house those prisoners who are the 'worst of the worst,' . . . with the very worst behavioral histories in the prison system." Pet. Br. at 1. Level 2 is reserved for the "most incorrigible" and "recalcitrant" even among LTSU inmates. *Id.* at 4. These "prisoners . . . have engaged in or instigated riots, . . . are members of prison gangs, or . . . have a history of sexual predation." *Id.* They may "have an escape history, . . . a predilection for assaultive behavior with an intent to cause death or serious injury, or . . . otherwise present a serious threat to prison security." *Id.* at 3-4.

These are "'extremely disruptive, violent and problematic inmates'," *id.* at 6; they are the most "obdurate intractable prisoners" in the Pennsylvania corrections system, *id.* at 8. They have reached the "last stop on the disciplinary continuum" for prisoners who have effectively "'flunked out'" of all other "increasingly severe" housing units. *Id.* at 2-4. When they arrive at Level 2, they lose virtually all of

their remaining privileges – even as compared to Level 1[7] – as they become subject to severe restrictions on their movements, possessions, exercise, commissary privileges, telephone access, and visitation with family or friends. *Id.* at 4-6; J.A. at 33. They have not been deterred.

This Court should not accept without further inquiry Petitioner's assertion that these violent murderers, sexual predators, and prison gang members – undeterred at any step of the way in the Pennsylvania penal system – will be deterred from committing violent sexual and physical assaults or from attempting to escape by the paucity of reading material

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7. "Privileges afforded Level 2 inmates" are limited to: "(1) In cell activities; (2) In cell counseling services; (3) Employment as a unit janitor [if and only if no Level 1 inmate is available, *see* J.A. at 102 (table)]; (4) 1 Hour, 5 days per week of outside yard; (5) Recreational and legal law library services [no physical access to the library, *see id.* at 129]; (6) Legal and personal correspondence; (7) In cell religious visits by a Chaplain[]; (8) Three . . . showers per week; (9) One . . . visit, non-contact, immediate family only, per month; and (10) Emergency phone calls only once approved and verified by Unit Management Team." *Id.* at 32-33. On the basis of good behavior, an inmate may be promoted to "Level 1" where he is afforded "increased programming and privileges." *Id.* at 33. For example, a Level 1 inmate: (1) may have two visits a month, *id.* at 97; (2) may receive "any approved visitor," *id.* at 34, 97; (3) gains commissary privileges, *id.* at 33; (4) is entitled to one fifteen-minute phone call per month, *id.*; (5) may undertake in-cell study (G.E.D. and Special Education programs), *id.*; (6) may participate in programming in "substance abuse; anger/violence management; life skills; parenting skills; and effective emotional expression," *id.* at 44; (7) receives preference in employment decisions, *id.* at 102 (table); and (8) is eligible to have further additional privileges authorized at the discretion of prison administration, *id.* at 33. Typically, a large majority of LTSU inmates are assigned to Level 2. *Id.* at 130-31. The number of Level 1 inmates is "generally in the single digits." *Id.*

available in level 2. The bald statement that this purported deterrent might work on some small number of inmates does not, without more, entitle the government to judgment as a matter of law.

In *Thornburgh*, the Court explained that "[w]here . . . the nature of the asserted governmental interest is such as to require a lesser degree of case-by-case discretion," as it does in this case of a regulation very unlikely to have any constructive effect on all but a small number of prisoners, "a closer fit between the regulation and the purpose it serves may safely be required." 490 U.S. at 412. This is a textbook "exaggerated response": The burden on these inmates' First Amendment rights far exceeds the speculative benefit.

"Common sense" also does not establish a connection between the ban on newspapers, magazines, and photographs and the hope for improved behavior by those "worst of the worst" prisoners already in Level 2. As the court of appeals noted in this case, some experts hold the view that "deprivation of reading materials in segregation can cause 'psychological deterioration' which in turn can cause inmates either to be 'very withdrawn and curl up in infancy, or [to] become acting out and aggressive people.'" *Banks*, 399 F.3d at 142 n.9 (quoting *Spellman v. Hopper*, 95 F. Supp. 2d 1267, 1281 (M.D. Ala. 1999)).[8] On the other hand, "[r]ehabilitative goals are

8. *See also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 368 (1987) (Brennan, J., dissenting) (denial of First Amendment activity "may extinguish an inmate's last source of hope for dignity and redemption"); *Martinez*, 416 U.S. at 428 (Marshall, J., concurring) (observing that, "[i]f anything, the needs for identity and self-respect" promoted by preservation of inmates' First Amendment rights "are more compelling in the dehumanizing prison environment").

'furthered by efforts to inform and educate inmates, and foster their involvement in the world outside the prison gates.'" *Id.* (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1034 (2d Cir. 1985)); *see also Morrisson v. Hall*, 261 F.3d 896, 904 n.7 (9th Cir. 2001) (citing studies and articles noting the correlation between reading and writing and inmate rehabilitation). One court noted that "[t]he simple opportunity to read a book or write a letter, whether it expresses political views or absent affections, . . . nourishes the prisoner's mind despite the blankness and bleakness of his environment." *Wolfish v. Levi*, 573 F.2d 118, 129 (2d Cir. 1978), *rev'd sub nom. Bell v. Wolfish*, 441 U.S. at 520. In sum, common sense does not establish, as a matter of law, that deprivation of reading material is likely to lead to improved inmate behavior.

B. Common Sense Belies The Fire, Contraband, And Weapons Justifications.

Petitioner also asserts that "[t]he challenged restrictions . . . serve the goal of prison security . . . by reducing the opportunity to hide contraband and by withdrawing material that can be fashioned into crude tools or weapons or used to start cell fires." Pet. Br. at 27. However, the regulations at issue in this case do not restrict the amount of material available to the inmates, nor do they address the physical attributes of that material. Under like circumstances, lower courts have routinely rejected similar contentions as illogical. *Compare Prison Legal News v. Lehman*, 397 F.3d 692, 700 (9th Cir. 2005) (rejecting fire and contraband justifications for a ban on bulk mail as "irrational" where the prison administration "already regulates the quantity of possessions that prisoners may have in their cells"); *Morrison*, 261 F.3d at 902 (concluding that it was "'irrational' to prohibit prisoners from receiving subscription for-profit mail on the

theory that it reduces fire hazards"); *Mann v. Smith*, 796 F.2d 79, 82 (5th Cir. 1986) ("Because the jail has a no-smoking rule for inmates and because the jailers permit the inmates to have other forms of paper and similar materials, the official rationale seems tenuous at best."); *Spellman*, 95 F. Supp. 2d at 1274 (rejecting fire and contraband rationales as irrational); *Payne v. Whitmore*, 325 F. Supp. 1191, 1193 (N.D. Cal. 1971) ("Jail cells are already filled with an abundance of materials quite suitable for fire starting . . . ; yet no one suggests that cells ought to be stripped of bedding, clothing, toilet paper, writing materials, and so on.") *with Howard v. Snyder*, 389 F. Supp. 2d 589, 593-94 (D. Del. 2005) ("two boxes per inmate" rule had valid, rational connection to fire and contraband-prevention rationales).

Common sense does not establish these connections. As the court of appeals held in this case, they are, in fact, "too attenuated to be reasonable." *Banks*, 399 F.3d at 143. Because DOC did not offer any evidence in support of the contraband, fire, and weapons justifications, it was not entitled to judgment as a matter of law.

* * *

In the face of these assertions, it was perfectly appropriate for the court of appeals to look for evidence in the record. *See Turner*, 482 U.S. at 97-99. The "paucity of any such evidence . . . *reinforces* the conclusion" that the asserted connections are not valid or rational. *Banks*, 399 F.3d at 142 n.10 (emphasis added); *see also Shaw v. Murphy*, 532 U.S. 223, 231 (2001) (citing evidence that "[p]risoners have used legal correspondence as a means for passing contraband").

III. PETITIONER'S REGULATION LEAVES NO ALTERNATIVE MEANS TO EXERCISE THE RIGHT IN QUESTION.

Petitioner advances several arguments in support of its claim, under the second *Turner* factor, that LTSU Level 2 offers inmates adequate alternative means to exercise the right in question. It is apparent, however, that the DOC's restrictions do not leave any alternative means to exercise these rights.

Effectively conceding as much, Petitioner attempts to redefine the First Amendment right at issue. That is, Petitioner contends that the right in question is not "'the right of access to a reasonable amount of newspapers, magazines and photographs,' but rather the right to receive information and communications from the outside world." Pet. Br. at 29-30.[9] Based on this redefined First Amendment right, Petitioner argues that legal consultations, limited communications with clergymen, monthly family visits, and "leisure books" from the prison library provide a reasonable alternative means of exercising the right:

> LTSU Level 2 inmates have ample alternative means of exercising that right: they are allowed monthly visits with immediate family, and unlimited visits from legal counsel; they receive daily visits [from] a Facility Chaplain; they may order books from the prison library; and they may send letters to and receive letters from family, friends and others, which may include newspaper or magazine articles with a personal connection to themselves.

Id. at 30.

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9. Note that this argument was not presented to the court of appeals. *See Banks*, 399 F.3d at 139 n.5 & 144 n.15.

This argument is a red herring. First, under the *Turner* analysis, "the right in question must be viewed reasonably and expansively." *See Thornburgh*, 490 U.S. at 417. In *Thornburgh*, for example, the Court upheld a censorship policy and explained that the restrictions were constitutional because they "permit[ted] a broad range of publications to be sent, received, and read.' *Id.* at 418. This Court was "comforted by the individualized nature of the determinations required by the regulation" because "no publication" could "be excluded unless the warden himself ma[de] the determination that it [wa]s 'detrimental to security, good order, or discipline of the institution or . . . might facilitate criminal activity.'" *Id.* at 416. The Court warned that "[a]ny attempt to achieve greater consistency" than could be achieved in case-by-case censorship might "run afoul of the second *Turner* factor, *i.e.*, the presence or absence of 'alternative means of exercising the right' in question." *Id.* at 417 n.15; *see also Wolfish*, 441 U.S. at 551 (examining existence of "alternative means of obtaining reading material").

That reasoning is consistent with First Amendment decisions outside of the prison context, where this Court has always held that the right to information and ideas is a right to receive *specific* information and ideas. *See Bd. of Educ. v. Pico*, 457 U.S. 853, 869 (1982) (plurality) (discussing "regime of voluntary inquiry" in school library); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) ("the protection afforded is to the communication, to its source and to its recipients both"); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (discussing union president's "right to speak and the rights of the workers to hear what he had to say"). For example, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court explained that

"the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Id.* at 482.

Here, Petitioner has, for all practical purposes, stopped the flow of certain "core" First Amendment information, including politics and current events, to these prisoners altogether. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991) ("the discussion of governmental affairs . . . is at the core of our First Amendment freedoms"). Properly understood and "reasonably" construed within the meaning of *Thornburgh*, *see* 490 U.S. at 417, the right to information and ideas cannot, therefore, be satisfied by periodic legal consultations, daily spiritual advice, and monthly family visits. DOC's restriction, therefore, cannot be sustained on the basis of this record.

IV. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PRISONERS' FIRST AMENDMENT RIGHTS CAN BE ACCOMMODATED AT A *DE MINIMIS* COST TO THE PETITIONER, WHICH CAN ACHIEVE ITS GOALS BY ALTERNATE MEANS.

For the reasons stated by the court of appeals, DOC's ban on newspapers, magazines, and photographs in LTSU Level 2 likewise fails under the third and fourth *Turner* factors, reinforcing the conclusion that the ban is an "exaggerated response."

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JEFFREY BEARD,

Petitioner,

v.

RONALD BANKS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PRISON LEGAL NEWS, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE FREEDOM TO READ FOUNDATION, THE ASSOCIATION OF AMERICAN PUBLISHERS, THE AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AND PUBLISHERS MARKETING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae, publishers, reporters, librarians, retailers, and other disseminators of books, newspapers and magazines, carry on the strong historic tradition recognizing the importance of an informed citizenry and thus provide communicative works, both serious and entertaining, which for more than 200 years have been protected by the First Amendment. *Amici* file this brief because the Pennsylvania Department of Corrections' blanket policy banning access for an indefinite period to virtually any and all newspapers, magazines and photographs, irrespective of content, by Level 2 inmates is an unconstitutional infringement on the rights of those prisoners. The extreme broad-brush policy impermissibly stifles the constitutionally protected free flow of information and communication in the prison context. The right to open access to the media, including sources for discussions of current national and worldwide news and events, is a fundamental right safeguarded by the First Amendment. The policy imposed by Pennsylvania violates the prisoners' ability to exercise this basic right and also unnecessarily interferes with the public interest in bringing to light possible abuse or inhumane conditions in prisons.

Access to media reports of, and discussion of issues related to, current news and events is critical. Prisoners should not be denied the right to full information concerning the United States and countries around the world, particularly against the backdrop of recent geopolitical events. Nor should prisoners be prohibited from reading short stories, reports about what is happening in sports and other areas of general interest, or lighter materials. The ability to access information by reading newspapers and

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[1] No counsel for any party authored any part of this brief. No persons or entities other than the *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been filed with this Court.

magazines is essential to the education and advancement of all persons—including, in particular, those who presently are in prison but may return to society.

The statements of interests of the individual *amici curiae* are set forth in the Appendix.

STATEMENT OF THE CASE

This case is about the free speech rights of prisoners and their media correspondents. Pennsylvania imposes a set of prison regulations that impermissibly curtails the First Amendment rights of newspaper and magazine publishers and writers to transmit ideas and information. Unless a publication is deemed by prison officials to be religious or legal in nature, publishers have no way of sending newspapers and magazines to individuals housed in Level 2 of Pennsylvania's Long Term Segregation Unit ("LTSU"). *Banks v. Beard*, 399 F.3d 134, 137 (3d Cir. 2005). Whether a publication falls into one of these categories is left to the standardless discretion of prison officials. As the exceptions have been applied, the free speech rights of some religious publishers have been infringed, *see* Jt App 179 (Level 2 inmates not permitted to receive the *Christian Science Monitor*, a weekly newspaper published by the First Church of Christ, Scientist), as have the rights of legal news publishers, *see* Jt App 49 (Level 2 inmates not permitted to receive *Graterfriends*, a monthly publication containing news on legal and other developments affecting prisoners).

A prisoner may be kept at Level 2 indefinitely. Jt App 131 (the duration of a prisoner's classification at Level 2 is a minimum of 90 days and has in some cases lasted months and even years). Prison officials encourage inmates entering LTSU to cancel all newspaper and magazine subscriptions. Jt App 158. If the prisoner does not cancel the subscription, the publications are kept in a property box for him; after the box capacity is filled, the publications are destroyed or otherwise disposed of. Jt App 159.

SUMMARY OF ARGUMENT

This case strikes at the heart of the First Amendment's protection of the exchange of information and enlightened participation of all citizens in a democratic government. Although the direct effect of the challenged prison regulation is to block the flow of information into the prison, its impact extends beyond prison walls. It treads heavily on the rights of the print media and interferes with the media's central function as "a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Houchins v. KQED*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring). The media's ability to fulfill its function as the so-called Fourth Estate depends on its access to the darkest corners of the nation, "acting as the 'eyes and ears' of the public," and, at times, as its voice. *Id.* at 8 (opinion of Burger, C.J., announcing judgment of the Court).

Where the venue is under the exclusive control of the government, as with prisons, several principles deserve consideration. It is true that the Constitution's guarantees of free speech and press do not grant the media a freestanding right to enter governmental institutions. *See Pell v. Procunier*, 417 U.S. 817, 834 (1974). Its access can, and has been, tightly circumscribed. *See, e.g., id.* (prisons may deny journalists access to face-to-face interviews with specific prisoners); *KQED*, 438 U.S. 1 (jail can prohibit use of sound and image recording devices and can restrict media tours). But the media's interest in access to prisons is not limited to direct investigative reporting. Printed publications convey information as well as provide a forum for discussion and response. An inmate who has access to newspapers and magazines might, for example, read a news article discussing matters he is personally familiar with—perhaps prison conditions—and respond to the editor by offering relevant information or a unique perspective. Only his receipt of the

news publication enables this important mechanism of exchange to occur. The media entities' and prisoners' speech rights are, in this manner, "inextricably meshed." *Procunier v. Martinez*, 416 U.S. 396, 409 (1974).

Here, the constriction on media access is too tight for the Constitution to tolerate. Pennsylvania's policies destroy the mechanism of expressive exchange between print media entities and the affected class of prisoners. Its attempt to amputate a segment of the prison population from the outside world harms the rest of society, and is precisely the type of government action that the First Amendment was designed to restrain. Under the circumstances created by the near-absolute ban on newspapers and magazines, the competing interest of allowing the government broad discretion in the administrative duties of running a prison cannot trump the weighty concerns of the press and the public in fostering the healthy exchange of ideas.

Aside from personal letters, news clippings related to the inmate or his family, and a narrowly drawn category of religious and legal materials, the only written materials available to Level 2 inmates are "leisure books" from the prison library. *Banks*, 399 F.3d at 137; Jt App 48. As a result, inmates effectively are cut off from news of current events and other developments in the outside world. *See id.* (inmates are shut in single occupancy cells for twenty-three hours a day with no radio or television and permitted only one visit per month with immediate family members). Prison policies provide for a behavioral review where, subject to the discretionary decision of prison officials, an inmate can be promoted to a less restricted status. *Banks*, 399 F.3d at 141; Jt App 26. Due to the subjective nature of the review, there is no reasonable assurance that even exemplary behavior in Level 2 status will earn a relaxation of the restrictions. *Accord* Chase Riveland, U.S. Dep't of Justice, *Supermax Prisons: Overview and General Considerations* 8-9 (1999) ("[A]dministrative segregation of

an inmate...is an approved remedy [in some institutions] without application of objective criteria or verified misconduct.... Following periodic reviews, segregation of such inmates may then be continued, despite exemplary behavior in segregation....").

Publishers, editors, and writers have little effective means of communicating with these inmates. Direct personal letters to individual prisoners are not a realistic option for print media since ideas and information expressed through printed publications lose fundamental characteristics if redirected through individual letters. Personal letters to prisoners cannot contain the same breadth of information, juxtaposition of different opinions, or graphics and photographs, or capture the common experience enjoyed by those who read the same article in a publication. Corresponding this way is practically impossible for publishers and writers given the fundamental purpose of the printed publication to facilitate widespread dissemination of information at minimal cost. Although an inmate can initiate correspondence with the editor of a particular publication by sending a personal letter, the Level 2 policies deny the inmate access to the materials most likely to cause him to correspond in the first instance—the publications themselves. In this way, the prison's ban on general publications disrupts the basic discursive function of informative or opinion pieces, which catalyze idea exchange by presenting views likely to generate responsive expression.

First Amendment rules applicable to non-public fora govern the Court's review of the Pennsylvania policy. In the prison context, these rules are set forth in a multifactor test that requires federal courts to balance cautiously the legitimate needs of prison administration and "the need to protect constitutional rights." *Turner v. Safley*, 482 U.S. 78, 85 (1987) (alteration omitted). The manifold nature of the *Turner* test recognizes the tension between these competing goals. At risk on one hand is judicial disruption of the

"inordinately difficult undertaking that is modern prison administration." *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (quotation marks omitted). On the other hand are the vulnerable interests of prisoners, who, though they must give up liberties "inconsistent with proper incarceration," nonetheless do not relinquish their constitutional rights at the prison gates, *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003), as well as the interests of the media and the public.

The various concerns at stake require that the *Turner* test be applied with an eye towards the competing principles and the ultimate inquiry: Is the challenged restriction on constitutional rights "reasonably related to legitimate penological interests" or is it an "exaggerated response" to prison concerns? *Turner*, 482 U.S. at 89, 91. It stands to reason that the broad focus of the test should not permit its application as either judicial bludgeon or rubber stamp. As testimony to the "express flexibility of the *Turner* reasonableness standard," *Thornburgh*, 490 U.S. at 414, lower court decisions have come down both ways on a variety of different prison regulations. *Compare, e.g., Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228 (D.C. Cir. 2003) (upholding prison ban on electric and electronic musical instruments) *with Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001) (striking down restriction on subscription non-profit organization mail) *and Allen v. Coughlin*, 64 F.3d 77 (2d Cir. 1995) (reversing summary judgment in favor of prison officials who confiscated newspaper clippings). This case presents the opportunity to reaffirm the careful balance Justice O'Connor struck in her opinion for the Court in *Turner*. If the Court is to remain true to its promise that the *Turner* standard "is not toothless," *Thornburgh*, 490 U.S. at 414, it must affirm the decision of the Court of Appeals for the Third Circuit. Prison policies like Pennsylvania's cannot be permitted to suppress the ability of print media to facilitate "the widest possible dissemination of information from diverse and antagonistic

sources...[, a task] essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

ARGUMENT

I. PENNSYLVANIA'S PRISON POLICIES VIOLATE THE FIRST AMENDMENT

Where a state action impinges on the expressive rights of citizens, as here, analysis of its lawfulness is guided by basic First Amendment precepts. At the foundation of the Constitution's protection of the right to speech is the belief that free and vigorous exchange of opinions and information is what enables our democracy to thrive. *Accord United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000) ("It is through speech that our convictions and beliefs are influenced, expressed, and tested."). Although some ideas, in and of themselves, might not contribute to the betterment of society, it is their role in the process of experimentation, adaptation, and expression that the First Amendment protects. *See id.* ("The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost." (alteration omitted)); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) ("The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."). Watchful guardianship of these core principles is "essential if vigorous enlightenment was ever to triumph over slothful ignorance." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

Thus, in general, courts must uphold the rule that "the First Amendment bars the government from dictating what we see or read or speak or hear." *Free Speech Coalition*, 535 U.S. at 245. When government action threatens the role of the print media in facilitating idea exchange, the right to speech and expression must be more jealously guarded. *See*

Martin, 319 U.S. at 143 n.3 ("The only security of all is in a free press."). Naturally, these are guiding principles, not absolute rules. As many decades of this Court's precedent and the practicalities of government instruct, the contours of the First Amendment must fit the context and nature of the state action that impairs the freedom of speech. When the government owns and controls the venue in which it seeks to regulate speech, First Amendment doctrine imposes a tripartite framework, which looks first, as a threshold matter, at the purpose of the forum. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (hereafter "*ISKCON*") (A long line of speech rights cases "reflect, either implicitly or explicitly, a 'forum based' approach for assessing restrictions that the government seeks to place on the use of its property."). The three types of fora, in descending order of the First Amendment's vigilance, are: the traditional public forum; the designated public forum; and the non-public forum, which encompasses "all remaining public property." *See id.* at 678-79.

There is no question here that a state prison is not a public forum, and its rules therefore are not subject to strict scrutiny under the First Amendment. *See, e.g., Adderly v. Florida*, 385 U.S. 39 (1966) (restriction of First Amendment activities on jailhouse curtilage subject to reasonableness review). But "nonpublic forum status does not mean that the government can restrict speech in whatever way it likes." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998) (quotation marks omitted). State action imposing "a restriction on speech in a nonpublic forum is 'reasonable' when it is 'consistent with the government's legitimate interest in preserving the property for the use to which it is lawfully dedicated.'" *ISKCON*, 505 U.S. at 688 (O'Connor, J., concurring in the judgment) (quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50-51 (1983); quotation marks, alterations, and ellipsis omitted). Government regulations may "limit[] a nonpublic forum to

activities compatible with the intended purpose of the property," but ultimately the "touchstone for evaluating these [regulations] is whether they are reasonable in light of the purpose which the forum at issue serves" and are viewpoint neutral. *Perry*, 460 U.S. at 49; *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

Turner v. Safley reaffirmed these principles and set forth guidelines for their application in the prison context. *See* 482 U.S. at 89-91 (outlining four factors relevant to determining whether a prison regulation is "reasonably related to legitimate penological interests" and "operate[s] in a neutral fashion"). *Turner* and subsequent cases made clear that prison free speech cases are subject to the same "reasonableness" inquiry applied to non-public forum cases generally. The prison-specific *Turner* line of cases coevolved with the development of general forum based First Amendment doctrine. In the 1980s, as the focus on the "nature of the relevant forum" became established as the primary threshold inquiry for all government speech regulation, the prison context became determinative of the applicable standard of review. *See, e.g., United States v. Kokinda*, 497 U.S. 720, 726 (1990) (explaining that in 1983, *Perry* "announced a tripartite framework for determining how First Amendment interests are to be analyzed with respect to Government property," which had been in development since a decade prior).

Thornburgh v. Abbott, 490 U.S. 401 (1989), aligned prison speech cases with the rest of "forum based" doctrine. It resolved any lingering ambiguity that the identity of the holder of the right, rather than the nature of the forum, could dictate the application of a fatal, or near-fatal, strict scrutiny approach. 490 U.S. at 409-14 & n.9 ("[O]ur rejection of the regulation at issue [in *Procunier v. Martinez*, 416 U.S. 396 (1974),] resulted not from a least restrictive means requirement, but from our recognition that the regulated activity centrally at issue in that case—outgoing personal

correspondence from prisoners—did not, by its very nature, pose a serious threat to prison order and security."). What these two decades of decisions teach is that, notwithstanding Petitioner's arguments to the contrary, prisons are not *sui generis* for First Amendment purposes. They are instead a type of non-public forum subject to the same basic constitutional principles and constraints as other non-public fora, such as airports, *see ISKCON*, 505 U.S. 672, and public school mail systems, *see Perry*, 460 U.S. 37.

A. The First Amendment Right of Access to Newspapers and Magazines in Prison Is Not Inconsistent With the Legitimate Purposes of Prison Administration

A broad-based restriction of speech on a non-public forum must be supported by at least "some explanation as to why [the restricted] speech is inconsistent with the intended use of the forum." *ISKCON*, 505 U.S. at 691-92 (O'Connor, J., concurring in the judgment); *cf. Shaw v. Murphy*, 532 U.S. 223, 229 (2001) ("In the First Amendment context,...some rights are simply inconsistent with the status of a prisoner or 'with the legitimate penological objectives of the corrections system.'"). Without some sort of justification, the government regulation is likely to be unreasonable in relation to the legitimate needs of the forum, or in *Turner*'s terms, an "exaggerated response" to administrative concerns. *Turner*, 482 U.S. at 90. Although the nature of the forum plays an important role in determining compatibility, some liberties that fall within the First Amendment's ambit are consistently more easily curtailed than others. Associational rights involving in-person, physical interaction tend to pose the greatest security risks and administrative costs in many different contexts. *See, e.g., Overton*, 539 U.S. 126 (prison visitation); *ISKCON*, 505 U.S. 672 (in-person solicitation inside airport); *Kokinda*, 497 U.S. 720 (solicitation and demonstration on post office premises). Regulations limiting freedom of

association are perhaps the most frequently and easily sustained. *Accord Overton*, 539 U.S. at 131 ("[F]reedom of association is among the rights least compatible with incarceration."). The problems accompanying physical association are sometimes so "obvious that its regulation may 'ring of common sense.'" *ISKCON*, 505 U.S. at 690 (O'Connor, J., concurring in the judgment) (quoting *Kokinda*, 497 U.S. at 734). Other First Amendment rights, by contrast, are more compatible with the purpose of the government property, and are more robust in the face of extensive regulation. *Cf. Kokinda*, 497 U.S. at 739 (Kennedy, J., concurring in the judgment) ("[I]n-person solicitation deserves different treatment from alternative forms of solicitation and expression.").

The opposite results reached in the *International Society for Krishna Consciousness* decisions (collectively, "*ISKCON*"), 505 U.S. 672 and 505 U.S. 830, illustrate the constitutional difference between regulating rights requiring physical interaction and regulating free speech rights exercised through printed materials. *ISKCON* concerned a challenge to restrictions limiting solicitation and distribution of leaflets in New York area airports. 505 U.S. 672; 505 U.S. 830. The solicitation ban was a legitimate response to the airport's need to avoid disrupting the flow of traffic and prevent the risk of duress, and its inability to monitor problems arising from solicitation. 505 U.S. at 683-85. By contrast, the prohibition of leafleting could not withstand First Amendment scrutiny even though it was supported by many of the same justifications. 505 U.S. at 831. Justice O'Connor, authoring the concurring opinion and stating the narrowest grounds for the holding as to the leafleting ban, explained that it could not stand because it "effect[ed] an absolute prohibition and [was] not supported by any independent justification outside of the problems caused by the accompanying solicitation." *Id.* at 691. The availability of "alternative channels" for distributing leaflets—the

sidewalks outside the airport terminals—was not enough to protect the First Amendment rights of leafletters from the "total ban" imposed inside the terminal buildings. *Id.* at 692. The appropriate focus was on the area impacted by the agency regulation—the inside of the airport—where the restriction was so sweeping in scope that it could not be explained as a reasonable measure designed to "preserve the property for the several uses to which it has been put." *Id.*

First Amendment concerns in the prison context are no different. Limitations on in-person associational rights require little work to justify because the "very object of imprisonment is confinement." *Overton*, 539 U.S. at 131; *see also Pell*, 417 U.S. 817. In-person association in the prison context also poses serious safety and security risks, which unquestionably are an area of concern primary to the government's legitimate purpose of running a prison. *See Overton*, 539 U.S. at 133-34. Just as the burden on visitation rights in *Overton* is analogous to the prohibition on airport solicitation, so is the near-"absolute ban" on published materials in this case analogous to the rule against distributing printed leaflets in the airport terminal in *ISKCON*. In several ways, the speech rights of newspaper and magazine publishers suffer even more severe oppression here than those of the leafletters in *ISKCON*. Publishers attempting to send subscription periodicals to Level 2 prisoners are prevented from engaging in a desired, indeed contracted-for, expressive exchange. In *ISKCON*, however, the speakers' activity was likely to be unwanted by most potential listeners. Even with the ban in place in *ISKCON*, a traveler so desiring could always seek out leaflet distributors outside the terminal building. But in the Pennsylvania prison system, the publisher's access to the subscriber is cut off completely and indefinitely.[2] Because nothing in this case

[2] Indefinite detention is more than merely theoretical. Pennsylvania prisoners have actually been held in segregation for over 30 years. *See*,

explains why the First Amendment right to send newspapers and magazines to prisoners is incompatible with the central purposes of running a prison, just as with the *ISKCON* leafletters, application of the *Turner* reasonableness inquiry should yield the same result.

B. The Pennsylvania Prison Regulations Disrupt the Essential Function of the Print Media and Amount to an Attempt to Restructure the Modes of First Amendment Discourse

The special role of the press as catalyst and facilitator of expressive exchange is a well-recognized and driving force of First Amendment law. *See, e.g., Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 250 (1936) (The Constitution must "preserve an untrammeled press as a vital source of public information. The newspapers, magazines, and other journals of the country...have shed and continued to shed[] more light on the public and business affairs of the nation than any other instrumentality of publicity...."). Its unique position "as one of the great interpreters between the government and the people," *id.*, necessitates the rule that "laws that single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State, and so are always subject to at least some degree of heightened First Amendment scrutiny." *Turner Broad. System, Inc. v. Fed. Communications Comm'n*, 512 U.S. 622, 640-41 (1994) (quotation marks omitted); *Grosjean*, 297 U.S. at 250 ("[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.").

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e.g., Delker v. McCullough, 103 Fed. Appx. 694, 2004 WL 1552608 (3d Cir. 2004) (unpublished) (inmate had been held in administrative segregation since 1973); *see also Shoats v. Horn*, 213 F.3d 140 (3d Cir. 2000) (inmate held in segregation for 8 years). The Pennsylvania prison policy thus raises the specter of a lifetime publication ban.

Any attempt by the government, whether overt or not, to "determin[e] what future course the creation of ideas and the expression of views must follow" should be treated with suspicion. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 305 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part). When the government imposes a special burden on the media, as Pennsylvania has here, the constitutional concerns multiply. Not only do such regulations stifle expressive acts, they pose a special danger to the First Amendment because they jeopardize certain forms of expressive exchange. Where the government tries to "foreclose new and creative partnerships for speech," such as by preventing one segment of the prison population from engaging in productive discourse, its action "is consistent with neither the traditions nor principles of our Free Speech guarantee." *Id.*; *cf. Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544 (2001) (striking down restriction that had the effect of "distort[ing] the legal system by altering the traditional role of the attorneys in much the same way broadcast systems or student publication networks were changed" by unconstitutional restrictions).

The ability of prisoners to communicate outside prison walls is essential to the media's role in exposing important public controversies. History contains countless examples of the media's involvement in bringing to light, and eventually to justice, instances of prison abuse and inhumane conditions. *See, e.g.*, Dannie M. Martin & Peter Y. Sussman, *Committing Journalism – The Prison Writings of Red Hog* (W.W. Norton & Co. 1995) (news stories about Kevin Sherbondy, sentenced to 15 years for "possession" of a firearm he owned for decorative purposes brought significant attention to the case and resulted in the Ninth Circuit overturning his sentence); Dannie Martin, *Doing Time with Disease*, S.F. Chronicle, June 12, 1994, at 4 (calling attention to feces-contaminated drinking water at Terminal Island Federal Prison); Seth Rosenfeld, *State's Top*

Prison Too Cruel, Judge Says, S.F. Examiner, Jan. 11, 1995, at A1 (public outcry after media reports of inmate being boiled alive led to class-action litigation and, ultimately, a court ruling finding conditions at Pelican Bay prison unconstitutional); Vincent Schiraldi, *Prison Bureaucrats Hide Abuses by Banning the Press*, S.F. Examiner, Feb. 5, 1996, at A13 (prison administrators imposed a ban on media interviews with prisoners partly in reaction to bad publicity generated by "60 Minutes" exposé on prisoner abuse incident); *see also Madrid v. Gomez*, 889 F. Supp. 1146, 1280 (N.D. Cal. 1995) ("dry words on paper can not adequately capture the senseless suffering and sometimes wretched misery that defendants' unconstitutional practices [at Pelican Bay] leave in their wake."); Bob Minzesheimer, *The Written Word Unshackled*, USA Today, April 20, 2004, at 4D (strong public reaction to cancellation of prison rehabilitation writing program and denial of royalty fees and prize money to prisoners led to reinstatement of program and prize money); William Yardley, *Inmate Can Keep Money Earned from a PEN Literary Award*, N.Y. Times, April 17, 2004, at B1 (rehabilitation program was reinstated, according to state Attorney General, because communicating with the public gives "prisoners the right and opportunity to express themselves and to rehabilitate in the best sense of the word").

The proper functioning of the media depends not only on prisoners' ability to transmit information outside the prison, but also on their ability to receive news from the outside. At times, a newspaper writer or editor may be able to confirm whether an incident was an isolated event or widespread prison condition only through disseminating information to prisoners and collecting their responses. Any government interference in this process, let alone Pennsylvania's attempt to entirely quash it with respect to the Level 2 prisoners, threatens an essential means of holding a powerful government institution accountable.

C. The Pennsylvania Prison Regulations Impermissibly Discriminate Against Non-Religious, Non-Legal Newspapers and Magazines

The First Amendment requires prison regulations to be viewpoint neutral. *Thornburgh*, 490 U.S. at 417; *see also Arkansas Educ. Television Comm'n*, 523 U.S. at 682 ("To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint...."). Viewpoint discrimination occurs not just when one particular point of view is suppressed, but also when "an entire class of viewpoints" is disfavored. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 831 (1995). The Constitution does not tolerate regulations that burden those wishing to exercise their First Amendment rights on the grounds that their point of view is religious. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393-94 (1993); *see also Rosenberger*, 515 U.S. at 831 (public university could not treat disfavorably "student journalistic efforts with religious editorial viewpoints.")

But just as the state cannot disfavor publications featuring a religious "standpoint from which a variety of subjects may be discussed and considered," *Rosenberger*, 515 U.S. at 831, neither can it discriminate against the non-religious viewpoint expressed through newspapers and magazines. The Pennsylvania prison policies are not viewpoint neutral because they do exactly that. The collection of religious viewpoints discriminated against in *Rosenberger* is the flip side of the coin to the set of non-religious viewpoints prohibited here, and no principled distinction can be drawn between the restriction at issue in *Rosenberger* and the policies at issue here. *Accord Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 230-31 (1987) (holding unconstitutional a tax on publications that exempted religious and sports magazines, and acknowledging that the distinction between content and

viewpoint-based discrimination is not always clear). Even more antithetical to the First Amendment is the fact that Pennsylvania's policies grant prison officials the discretion to determine whether a publication is religious. As this Court has cautioned: "The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Rosenberger*, 505 U.S. at 835. This warning is particularly apt here, where no safeguards exist to prevent the state from exercising its discretion to permit the materials of one religion while prohibiting the materials of another.

Also suspect is the application of the policy to legal materials. News of important legal developments and court decisions are often contained in a wide array of publications, the vast majority of which are prohibited under the Pennsylvania policy. *Cf.* Jt App 49. This Court's decisions related to criminal procedure, civil liberties, and federal habeas law, for example, are often reported by national print media. Decisions such as *United States v. Booker*, 543 U.S. 220 (2005) (criminal sentencing), *Johnson v. United States*, 544 U.S. 295 (2005) (time limitation of federal habeas statute), or the result of this case, could directly affect inmates in segregated housing. Only through access to general publications can these prisoners receive necessary information about changes in their legal rights and therefore exercise their right to access courts.

II. *TURNER* DOES NOT DELEGATE THE CONSTITUTIONAL RESPONSIBILITY OF COURTS TO PRISON OFFICIALS

In *Turner v. Safley*, this Court reaffirmed the duty of "federal courts...to protect constitutional rights" in the face of "a prison regulation or practice [that] offends a fundamental constitutional guarantee." 482 U.S. at 84 (quoting *Martinez*, 416 U.S. at 405-06 (1974)). *Turner* decisively rejected the notion that fundamental rights

enjoyed by free citizens vanish upon incarceration. *See id.* at 94-95 (rejecting prison officials' argument that the constitutional right to marriage does not apply "in...a prison forum"). Subsequent decisions likewise acknowledged courts' obligation to examine prison regulations alleged to infringe on constitutional rights. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 137 (2003) (Stevens, J., concurring) ("Our decision today is faithful to the principle that 'federal courts must take cognizance of the valid constitutional claims of prison inmates.'" (quoting *Turner*, 482 U.S. at 84)). Recognizing, however, the risk that courts engaged in constitutional review might too easily displace the reasoned judgment of prison administrators, the Court explained that the proper inquiry was whether the challenged prison regulation was "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

To strike the right balance between the competing interests of oversight and deference, *Turner* laid out four factors that help inform courts whether a challenged restriction passes constitutional muster or whether it is an "'exaggerated response' to prison concerns." *Id.* at 89-91. By requiring careful consideration of multiple factors, *Turner* declined to abdicate the duty of judicial review to prison administrators. *Cf. O'Lone v. Shabazz*, 482 U.S. 342, 348 (1987) ("[C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."). It instead sets forth a flexible framework that allocates deference where it is due—evaluation of legitimate penological interests such as "deterrence of crime, rehabilitation of prisoners, and institutional security," *id.*—but contemplates court intervention when prison restrictions work an unreasonable deprivation of constitutional rights. *See, e.g., Turner*, 482 U.S. at 95-100 (invalidating prison marriage rule). In formulation and application, it is clear that *Turner*'s reasonableness standard is neither "toothless" formalism nor

strict scrutiny, but a deferential inquiry somewhere between these poles. *Thornburgh*, 490 U.S. at 414.

Because the *Turner* inquiry integrates all relevant considerations, it applies regardless of whether the rights asserted belong to inmates or free persons. *See, e.g., id.* at 413-14. Constitutional challenges to prison restrictions that curb the liberty of free citizens whose interests are intertwined with those of inmates have come before this Court with some regularity. *E.g., Overton*, 539 U.S. 126 (restriction on prison visitation); *Thornburgh*, 490 U.S. 401 (regulation of incoming publications); *Pell*, 417 U.S. 817 (restriction on media interviews of prisoners). In its review of these cases, the Court has declined to draw a doctrinal line based on the identity of the party asserting the right. *E.g., Thornburgh*, 490 U.S. at 410 n.9. Were an intrusive standard of scrutiny to apply whenever non-prisoners' rights are implicated, prison officials would rapidly lose the ability to "deal with the difficult and delicate problems of prison management" free from excessive court interference. *Id.* at 408. Proper application of the *Turner* analysis, on the other hand, enables courts to give the outsiders' interests their due weight while maintaining appropriate judicial deference. *Cf. Overton*, 539 U.S. at 133 (considering in its reasonableness analysis the interests of children whose visitation was limited by prison rules). As *Turner* offers the unitary standard of review of restrictions "[i]n the prison context, when the government's power is at its apex," *Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 1150 (2005), remaining faithful to its guiding principles requires considered examination of all concerns captured by the four factors.

The lopsided formulation urged by Petitioner and its *amici* upsets this thoughtful balance. Petitioner's argument transforms *Turner* into carte blanche to subjugate the core constitutional rights of prisoners and non-prisoners alike in the name of creating sufficiently harsh conditions of confinement. Playing by these rules, prisons could freely

"exten[d] and withdraw[]" fundamental rights with no more difficulty than they could grant or deny gym privileges and commissary access. Brief for the United States as Amicus Curiae 11. The approach it advocates defines the remaining three factors as a tautological restatement of the first inquiry, reducing the analysis to an empty formality irreconcilable with *Turner* itself. Application of the *Turner* test in this manner champions form over substance, and derogates the duty of federal courts to guard against restrictions that unreasonably invade constitutional boundaries in the name of prison administration. The Court should reject this thinly cloaked invitation to erect a de facto "barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84.

III. THE THIRD CIRCUIT CORRECTLY APPLIED *TURNER'S* REASONABLE RELATIONSHIP TEST TO PENNSYLVANIA'S COMPLETE DENIAL OF NON-RELIGIOUS, NON-LEGAL NEWSPAPERS AND MAGAZINES

It is well established that the First Amendment protects the right to disseminate as well as "receive information and ideas." *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). The right survives incarceration and extends to both prisoners and "free citizens...reaching out to those on the 'inside.'" *Thornburgh*, 490 U.S. at 407. And "there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners." *Id.* at 408.

The Pennsylvania prison policy banning newspapers and magazines in Level 2 of the Long Term Segregation Unit prevents publishers and inmates from exercising their First Amendment rights to send and receive publications. Because the regulations "impinge[] on inmates' constitutional rights," the Third Circuit correctly applied the analysis set forth in *Turner* to determine the validity of the

prison policy. *Banks*, 399 F.3d at 139. Under *Turner*, a "regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. Consideration of four factors is relevant to the determination. First, the court "must determine whether the governmental objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective." *Thornburgh*, 490 U.S. at 414. "A second factor...is whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 89. "A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* at 90. Fourth, "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.*

Neither this Court nor lower federal courts applying the four *Turner* factors have understood these to be four distinct litmus tests. Rather, courts consistently have taken care to consider each of the factors in relation to one another prior to making the ultimate evaluation of the fit between the prison policy and the penological goal. *E.g.*, *Jacklovich v. Simmons*, 392 F.3d 420, 427 (10th Cir. 2004) (holding in error the district court's failure to consider all but the first factor); *DeHart v. Horn*, 227 F.3d 47, 59 (3d Cir. 2000) ("*Turner* does not call for placing each factor in one of two columns and tallying a numerical result. The objective is to determine whether the regulation is reasonable given the prison administrators' penological concerns and the inmate's interest in engaging in the constitutionally protected activity."); *Amatel v. Reno*, 156 F.3d 192, 191-201 (D.C. Cir. 1998) (weighing all four factors before determining that statute satisfied reasonable relation test); *Bradley v. Hall*, 64 F.3d 1276 (9th Cir. 1995).

It is sometimes said that the first factor of the *Turner* test, whether there is a logical connection between the regulation and a legitimate penological interest, dominates the inquiry. *E.g.*, *Amatel*, 156 F.3d at 196 ("The first factor looms especially large."). As this Court has explained, the heightened importance attributed to the logical connection factor does not mean that the remaining factors should be ignored in all cases, but arises from the necessary invalidation of any regulation that does not satisfy its standard. *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) ("If the connection between the regulation and the asserted goal is 'arbitrary or irrational,' then the regulation fails, irrespective of whether the other factors tilt in its favor."). In other words, nothing can save a regulation that bears no "logical connection" to a legitimate goal. *See, e.g.*, *Prison Legal News*, 238 F.3d at 1149-51 (invalidating restriction on subscription non-profit organization mail, "core protected speech," after considering first factor). The inverse, however, is not true. The challenged regulation's survival of the first factor still requires reasoned consideration of the remaining factors. Thus, the purported dominance of the "logical connection" factor refers to the cases where its application is fatal to the regulation. In all remaining cases, *Turner* requires "a judgment by the court regarding the reasonableness of the defendant's conduct under all of the circumstances reflected in the record." *DeHart*, 227 F.3d at 59.

A. Valid, Rational Connection Between the Prison Regulation and the Stated Government Interest

1. Application of the *Turner* Standard Permits Courts to Examine the Evidentiary Record

The first factor presents a twofold inquiry: is "the governmental objective underlying the regulations at issue [] legitimate and neutral, and [are] the regulations [] rationally related to that objective"? *Thornburgh*, 490 U.S. at 414. Among legitimate prison interests, "protecting prison

security[is] a purpose this Court has said is 'central to all other corrections goals.'" *Thornburgh*, 490 U.S. at 415 (quoting *Pell*, 417 U.S. at 823); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Any regulation whose dominant purpose is to advance prison security would naturally be entitled to considerable deference. These concerns do not, however, command that courts give a free pass to prison officials who utter the right magic words. Courts remain charged with the task of detecting when a restrictive measure is the kind of "exaggerated response" this Court has long warned of, lest constitutional abuses simply be recast through the talismanic invocation of "security" and "order."

Despite Petitioner's contentions to the contrary, *Turner*'s rational relation factor has always entailed more than the bare minimum level of judicial review. *Cf. Turner Broad. Sys.*, 512 U.S. at 641 ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force."). Courts applying *Turner* limit their consideration to penological goals actually advanced by prison officials. *Compare Shaw*, 532 U.S. at 229 (a rational connection must exist between regulation and the "governmental interest put forward to justify it") *with FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993) (rational basis review of Congressional action asks only whether there exists "any reasonably conceivable state of facts that could provide a rational basis," and the inquiry stops as soon as the court is able to imagine "'plausible reasons' for Congress' action"). Under the *Turner* framework, courts may not invent or substitute their own penological goals and rationale. *Cf. Davis v. Norris*, 249 F.3d 800 (8th Cir. 2001) (remanding for lack of evidence from the government); *Crofton v. Roe*, 170 F.3d 957, 960-61 (9th Cir. 1999). Courts must base their evaluation on the evidentiary record and the application of "common sense." *Turner*, 482 U.S. 97-98.

Although the burden of proof lies with the prisoner, *Overton*, 539 U.S. at 132, nothing about the burden allocation prohibits courts from "look[ing] closely at the facts of a particular case and the specific regulations and interests of the prison system" for evidence of a rational relationship. *Beerheide v. Suthers*, 286 F.3d 1179, 1185 (10th Cir. 2002). Where the nexus between a regulation and the government goal seems weak, the government's lack of "specific facts or explanation to support its argument," *Crofton v. Roe*, 170 F.3d at 960, might well suggest an attenuated relationship or exaggerated response. *Accord O'Lone*, 482 U.S. at 359 (Brennan, J., dissenting) (observing that "prison officials are in control of the evidence"). The Third Circuit engaged in no more searching an inquiry in this case than was proper under *Turner* to test the nature of the fit between the regulation and the stated goal. *See Banks*, 399 F.3d at 141-42 & n.10 (observing that the lack of evidence in the record "reinforces the conclusion" that there is no logical connection between Pennsylvania's regulation and its asserted purpose). Its analysis of the evidence was not, as Petitioner suggests, a requirement that the state produce empirical proof of the efficacy of its methods. Pet. Brief 23.

2. The Logical Connection Between the Regulation and the Government's Stated Goal of Behavior Modification Is, At Best, Extremely Attenuated

Pennsylvania prison officials assert three penological goals advanced by the LTSU Level 2 publication ban, of which behavior modification is the "primary, most important purpose."[3] Jt App 27. According to the prison rationale, depriving Level 2 inmates of their First Amendment rights

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[3] The other two justifications were that "the less material Level 2 prisoners have in their cells, the easier it is for correctional officers to detect concealed contraband and provide security" and "newspapers and magazines can be rolled up and used as blow guns or spears, can fuel cell fires, or can be used as crude tools to catapult feces at the guards." *Banks*, 399 F.3d at 138.

would "create an incentive to comply with prison rules and thereby be removed to Level 1 and eventually to the general population." *Banks*, 399 F.3d at 138. The prospect of losing access to newspapers and magazines would also affect the Level 1 and other inmates by discouraging them from misbehavior. *Id.* According to Petitioner's theory, the loss of newspaper and magazine rights would either scare or oppress inmates into compliance and result in greater order and institutional security. *See* Pet. Brief 24-25. In essence, the penological objective of the challenged regulations is to impose upon Level 2 inmates a quantum of harshness beyond the severity of less restrictive segregation levels.

Certainly, the establishment of a system of incentives is a legitimate "tool of prison administration." *McKune v. Lile*, 536 U.S. 24, 39 (2002) (plurality opinion). This Court has explained this principle in the First Amendment context: "Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose." *Overton*, 539 U.S. at 134. In *Overton*, the Michigan Department of Corrections promulgated regulations limiting the number and manner of visits a prisoner could receive, completely proscribing visits from most minors, in response to increased substance abuse problems in the prison. Observing that "freedom of association is among the rights least compatible with incarceration," and acknowledging that "[d]rug smuggling and drug use in prison are intractable problems," the Court applied the *Turner* factors and upheld the restriction as a reasonable exercise of administrative judgment. *Id.* at 131-36. *Overton* made clear that the prison administrative prerogative is at its apex when regulations govern the physical association of inmates. The strong relationship between the prison's interest in preventing drug smuggling made it easy for all nine Justices to vote in favor of upholding the regulation.

The challenged Pennsylvania regulation, however, does not concern inmate association and lacks any real connection to the stated prison objectives. Although the policy purports to serve a rehabilitative purpose, it prevents prisoners from receiving publications from rehabilitative organizations such as Alcoholics Anonymous, Stop Prisoner Rape, and so on, and exacerbates pervasive illiteracy in prisons. The blunt design of the regulation belies Petitioner's claimed rehabilitative purpose. The behavior modification rationale advanced by the state officials in this case reaches dramatically farther than any regulations upheld by this Court to date. Unlike the limit on in-person visitation in *Overton* or the tightly circumscribed category of prohibited publications in *Thornburgh*, the liberties that the LTSU policies curtail lack any nexus to disciplinary problems in Pennsylvania prisons. Instead, the restricted First Amendment rights appear to be chosen for limitation largely because their exercise would be highly valued. Moreover, because prison officials have framed their purpose in such a way that the greater the constitutional deprivation, the more likely it is to bring about the desired effect, common sense requires a healthy dose of skepticism. *See* Brief for the Becket Fund for Religious Liberty as Amicus Curiae 9-11. When privileges that do not implicate constitutionally protected rights are available for "extension and withdrawal," the prison administrators' choice to limit inmates' First Amendment rights makes the logical connection between the restriction and any legitimate penological goal seem dubious at best, and likely to be an "exaggerated response" to perceived prison needs.

B. Availability of Alternative Means to Exercise the Constitutionally Protected Right

The second factor concerns the existence of "alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90; *cf. ISKCON*, 505 U.S. at 692 (O'Connor, J., concurring in the judgment)

(regulations that "leave open ample alternative channels of communication" are more likely to be constitutional). Consideration of this factor should be paramount here, where the logical connection between the regulation and the legitimate penological goal is tenuous. Indeed, the Court has anticipated and cautioned against the conditions imposed by the Pennsylvania Department of Corrections. *See Thornburgh*, 490 U.S. at 417 n.15 (remarking that a "broadly restrictive rule against admission of incoming publications" might well "run afoul of the second *Turner* factor").

The correct unit of analysis for the second *Turner* factor is the group whom the regulation affects—Level 2 inmates. *Cf. ISKCON*, 505 U.S. at 692. Because of the indefinite duration of LTSU Level 2 tenure and lack of objective criteria for advancement to Level 1, there is no assurance that a Level 2 inmate will ever advance to a less restricted classification. Contrary to Petitioner's arguments, it is therefore inappropriate to inquire whether adequate alternatives exist for all prisoners generally. Focusing on Level 2 inmates, prison policies completely restrict the ability to receive communication from non-religious and non-legal publishers and writers. Aside from the limited amount of personal and legal correspondence that is still permitted, LTSU Level 2 inmates face a total deprivation of communication with the secular outside world. As Judge (now Justice) Alito acknowledged in his dissent from the Third Circuit opinion, "[t]his is the most troubling of the four factors." *Banks*, 399 F.3d at 149.

Petitioner's pinched application of the second *Turner* factor would approve virtually any limitation on expression, as long as some means remained for prisoners to "receive information and communications from the outside world." Pet. Brief 29-30. Such an approach misinterprets and vastly expands this Court's decisions. In *Overton*, for example, visitation rights were only proscribed for one group of prospective visitors, minors who were not the children,

grandchildren, or siblings of the prisoner. The prisoner and prohibited minors could still communicate with one another through letters and telephone calls. *Overton*, 539 U.S. at 135; *see also Pell*, 417 U.S. at 824-25 (media representatives who could not conduct in-person interviews could still communicate directly with prisoners by letter or telephone); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) (union was prohibited from mass distribution within prison but could still send materials through individual mail); *see also ISKCON*, 505 U.S. 672 (solicitors could disseminate their messages through distributing leaflets). The Pennsylvania restriction is categorically different from the ones upheld in *Overton*, *Pell*, and *Jones*. The policy here completely closes the avenue of communication between the prisoner and the "publishers who wish to communicate with those who, through subscription, willingly seek their point of view [and who] have a legitimate First Amendment interest in access to prisoners." *Thornburgh*, 490 U.S. at 408. It is much more akin to the "absolute ban" on leaflet distribution struck down in *ISKCON*. 505 U.S. at 831. The second factor weighs heavily in favor of invalidating the restrictions.

C. Effect of Accommodation

The third relevant factor for consideration is the "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90. After considering the proffered alternatives, the Third Circuit properly determined that accommodation of the First Amendment right in this case would not have a deleterious "ripple effect" on the rest of the prison population and staff. *Banks*, 399 F.3d at 146-48.

Evidence in the record supported the Third Circuit's determination that any impact on prison resources of accommodating these prisoner's First Amendment entitlements would be low, taking into account *Turner*'s

admonishment that "[i]n the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order." *Turner*, 482 U.S. at 90. The number of inmates to whom the accommodation would apply was only approximately forty, or 0.1% of the prison population. Jt App 127. Prison regulations already permitted Level 2 inmates to go to the mini-law library, Jt App 157, which would minimize the additional burden of the accommodation suggested by the Third Circuit. *Banks*, 399 F.3d at 147 (suggesting as a possible accommodation that "individual prisoners could be escorted to the secure mini-law library to read a periodical of their choosing"). The Third Circuit correctly determined that accommodations proposed by Banks were reasonable and not excessively burdensome to prison administrators.

D. Availability of Reasonable Alternatives

Finally, "the existence of obvious, easy alternatives [to accomplish prison goals] may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Turner*, 482 U.S. at 90. The primary asserted prison concern in this case is to create conditions of confinement unpleasant enough to deter non-LTSU Level 2 inmates from misbehaving and encourage Level 2 inmates to behave in the hopes of being promoted to a different level of housing. Pet. Brief 5. Aside from the high value inmates are likely to place on the exercise of their First Amendment right to newspapers and magazines, *cf. Kimberlin*, 318 F.3d at 240 (Tatel, J., concurring and dissenting) ("regulations that deprive prisoners of their constitutional rights will *always* be rationally related to the goal of making prison more miserable"), Petitioner demonstrated no specific interest in depriving inmates of publications.

The alternatives considered by the Third Circuit appropriately focused on the state's broad asserted goal of creating a more severe state of confinement than LTSU

Level 1. The record shows that Level 1 inmates are allowed to spend five dollars per week on commissary compared to no commissary privileges for Level 2 inmates; Level 1 inmates are permitted two immediate family visits per month rather than one, and one phone call a month rather than emergency calls only; Level 2 inmates are also allowed GED or Special Ed in-cell study program, are compensated for work, and can get additional privileges authorized at the discretion of prison officials. Jt App 32-33, 48, 102. Where, as here, the penological objective can be fulfilled through measures that do not burden constitutional rights, the infringing regulation is likely to be an exaggerated response. The Third Circuit correctly concluded that these differences between Levels 1 and 2 suffice to satisfy prison goals.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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February 16, 2006

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APPENDIX

INDIVIDUAL STATEMENTS OF INTEREST OF THE AMICI CURIAE

Prison Legal News ("PLN") is a non-profit, charitable corporation that publishes a nationally distributed monthly journal of the same name. Since 1990, *Prison Legal News* has reported on news, court decisions, and other developments relating to the civil and human rights of prisoners, crime victims, and correctional staff in the United States and abroad. *PLN* has the most comprehensive coverage of detention facility litigation of any publication. In addition to reporting on the rights of prisoners, *PLN* also reports on the rights of crime victims, prison and jail employees, and prison and jail visitors. Nearly every issue of *PLN* covers court decisions and information on the rights of prisoners in segregated control units. *PLN* has approximately 4,600 subscribers in all fifty states and abroad. Approximately sixty-five percent of *PLN* subscribers are state and federal prisoners, including prisoners in the custody of the Pennsylvania Department of Corrections, including its control units, and prisoners in control units nationwide.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interest of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Freedom To Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of

libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Publishers Marketing Association ("PMA") is a nonprofit trade association representing more than 4,200 publisher members across the United States and Canada. PMA members include independent, non-profit and university press who publish a variety of literary works, including fiction and non-fiction books on all topics. The works of its members contribute to the public debate on cultural, social and political issues. The right to open access to the media, including sources for discussion of current national and worldwide news and events, is of paramount concern to PMA's members. PMA believes that this case will potentially burden the First Amendment rights of its

members and bears directly on the ability of its members to disseminate and receive ideas and information.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS *v.* BANKS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04–1739. Argued March 27, 2006—Decided June 28, 2006

Pennsylvania houses its 40 most dangerous and recalcitrant inmates in a Long Term Segregation Unit (LTSU). Inmates begin in level 2, which has the most severe restrictions, but may graduate to the less restrictive level 1. Plaintiff-respondent Banks, a level 2 inmate, filed this federal-court action against defendant-petitioner, the Secretary of the Department of Corrections, alleging that a level 2 policy (Policy) forbidding inmates any access to newspapers, magazines, and photographs violates the First Amendment. During discovery, Banks deposed Deputy Prison Superintendent Dickson and the parties introduced prison policy manuals and related documents into the record. The Secretary then filed a summary judgment motion, along with a statement of undisputed facts and the deposition. Rather than filing an opposition to the motion, Banks filed a cross-motion for summary judgment, relying on the undisputed facts, including those in the deposition. Based on this record, the District Court granted the Secretary's motion and denied Banks'. Reversing the Secretary's summary judgment award, the Third Circuit held that the prison regulation could not be supported as a matter of law.

Held: The judgment is reversed, and the case is remanded.

399 F. 3d 134, reversed and remanded.

JUSTICE BREYER, joined by THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE SOUTER, concluded that, based on the record before this Court, prison officials have set forth adequate legal support for the Policy, and Banks has failed to show specific facts that could warrant a determination in his favor. Pp. 5–13.

Syllabus

(a) *Turner* v. *Safley*, 482 U. S. 78, and *Overton* v. *Bazzetta*, 539 U. S. 126, contain the basic substantive legal standards covering this case. While imprisonment does not automatically deprive a prisoner of constitutional protections, *Turner*, 482 U. S., at 93, the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere, *id.*, at 84–85. As *Overton*, *supra*, at 132, pointed out, courts also owe "substantial deference to the professional judgment of prison administrators." Under *Turner*, restrictive prison regulations are permissible if they are "reasonably related to legitimate penological interests." 482 U. S., at 89. Because this case is here on the Secretary's summary judgment motion, the Court examines the record to determine whether he has demonstrated "the absence of a genuine issue of material fact" and his entitlement to judgment as a matter of law. See, *e.g.*, Fed. Rule Civ. Proc. 56. If he has, the Court determines whether Banks has "by affidavits or as otherwise provided" in Rule 56, "set forth specific facts showing . . . a genuine issue for trial." Rule 56(e). Inferences about disputed facts must be drawn in Banks' favor, but deference must be accorded prison authorities' views with respect to matters of professional judgment. Pp. 5–6.

(b) The Secretary rested his motion primarily on the undisputed facts statement and Dickson's affidavit. The first of his justifications for the Policy—the need to motivate better behavior on the part of particularly difficult prisoners—sufficiently satisfies *Turner*'s requirements. The statement and affidavit set forth a "'valid, rational connection'" between the Policy and "'legitimate penological interests,'" 482 U. S., at 89, 95. Dickson noted that prison authorities are limited in what they can and cannot deny or give a level 2 inmate, who has already been deprived of most privileges, and that the officials believe that the specified items are legitimate as incentives for inmate growth. The undisputed facts statement added that the Policy encourages progress and discourages backsliding by level 1 inmates. These statements point to evidence that the regulations serve the function identified. The articulated connections between newspapers and magazines, the deprivation of virtually the last privilege left to an inmate, and a significant incentive to improve behavior, are logical ones. Thus, this factor supports the Policy's "reasonableness." The second, third, and fourth *Turner* factors—whether there are "alternative means of exercising the right that remain open to prison inmates," *id.*, at 90; the "impact" that accommodating "the asserted constitutional right [will] have on guards and other inmates, and on the allocation of prison resources," *ibid.*; and whether there are "ready alternatives" for furthering the governmental interest, *ibid.*—add little to the first factor's logical rationale here. That two of these

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three factors seem to favor the Policy therefore does not help the Secretary. The real task in this case is not balancing the *Turner* factors but determining whether the Secretary's summary judgment material shows not just a logical relation but a *reasonable* relation. Given the deference courts must show to prison officials' professional judgment, the material presented here is sufficient. *Overton* provides significant support for this conclusion. In both cases, the deprivations (family visits in *Overton* and access to newspapers, magazines, and photographs here) have an important constitutional dimension; prison officials have imposed the deprivation only upon those with serious prison-behavior problems; and those officials, relying on their professional judgment, reached an experience-based conclusion that the policies help to further legitimate prison objectives. Unless there is more, the Secretary's supporting material brings the Policy within *Turner*'s scope. Pp. 6–10.

(c) Although summary judgment rules gave Banks an opportunity to respond to these materials, he did not do so in the manner the rules provide. Instead, he filed a cross-motion for summary judgment, arguing that the Policy fell of its own weight. Neither the cases he cites nor the statistics he notes support his argument. In reaching a contrary conclusion, the Third Circuit placed too high an evidentiary burden on the Secretary and offered too little deference to the prison officials' judgment. Such deference does not make it impossible for those attacking prison policies to succeed. A prisoner may be able to marshal substantial evidence, for example through depositions, that a policy is not reasonable or that there is a genuine issue of material fact for trial. And, as *Overton* noted, if faced with a *de facto* permanent ban involving a severe restriction, this Court might reach a different conclusion. Pp. 10–13.

JUSTICE THOMAS, joined by JUSTICE SCALIA, concluded that, using the framework set forth in JUSTICE THOMAS' concurrence in *Overton* v. *Bazzetta*, 539 U. S. 126, 138, Pennsylvania's prison regulations are permissible. That framework provides the least perilous approach for resolving challenges to prison regulations and is the approach most faithful to the Constitution. "Sentencing a criminal to a term of imprisonment may . . . carry with it the implied delegation to prison officials to discipline and otherwise supervise the criminal while he is incarcerated." *Id.*, at 140, n. A term of imprisonment in Pennsylvania includes such an implied delegation. Inmates are subject to Department of Corrections rules and disciplinary rulings, and the challenged regulations fall with the Department's discretion. This conclusion is supported by the plurality's *Turner* v. *Safley*, 482 U. S. 78, analysis. The "history of incarceration as punishment [also] supports the view that the sentenc[e] . . . terminated" respondent's unfet-

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tered right to magazines, newspapers, and photographs. *Overton*, 539 U. S., at 142. While Pennsylvania "is free to alter its definition of incarceration to include the retention" of unfettered access to such materials, it appears that the Commonwealth instead sentenced respondent against the backdrop of its traditional conception of imprisonment, which affords no such privileges. *Id.*, at 144–145. Pp. 1–7.

BREYER, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and KENNEDY and SOUTER, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined. GINSBURG, J., filed a dissenting opinion. ALITO, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1739

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* RONALD BANKS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 28, 2006]

JUSTICE BREYER announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE SOUTER join.

We here consider whether a Pennsylvania prison policy that "denies newspapers, magazines, and photographs" to a group of specially dangerous and recalcitrant inmates "violate[s] the First Amendment." Brief for Petitioner i; see *Turner* v. *Safley*, 482 U. S. 78, 89 (1987) (prison rules restricting a prisoner's constitutional rights must be "reasonably related to legitimate penological interests"). The case arises on a motion for summary judgment. While we do not deny the constitutional importance of the interests in question, we find, on the basis of the record now before us, that prison officials have set forth adequate legal support for the policy. And the plaintiff, a prisoner who attacks the policy, has failed to set forth "specific facts" that, in light of the deference that courts must show to the prison officials, could warrant a determination in his favor. Fed. Rule Civ. Proc. 56(e); *Overton* v. *Bazzetta*, 539

U. S. 126, 132 (2003) (need for "substantial deference to the professional judgment of prison administrators").

I

A

The prison regulation at issue applies to certain prisoners housed in Pennsylvania's Long Term Segregation Unit. The LTSU is the most restrictive of the three special units that Pennsylvania maintains for difficult prisoners. The first such unit, the "Restricted Housing Unit," is designed for prisoners who are under disciplinary sanction or who are assigned to administrative segregation. App. 80. The second such unit, the "Special Management Unit," is intended for prisoners who "exhibit behavior that is continually disruptive, violent, dangerous or a threat to the orderly operation of their assigned facility." *Ibid.* The third such unit, the LTSU, is reserved for the Commonwealth's "most incorrigible, recalcitrant inmates." *Id.*, at 25.

LTSU inmates number about 40. *Id.*, at 127. Most, but not all, have "flunked out" of the SMU program. *Id.*, at 137. To qualify, they must have met one or more of the following conditions: failure to "complete" the SMU program; "assaultive behavior with the intent to cause death or serious bodily injury"; causing injury to other inmates or staff; "engaging in facility disturbance(s)"; belonging to an unauthorized organization or "Security Threat Group"; engaging in criminal activity that "threatens the community"; possessing while in prison "weapons" or "implements of escape"; or having a history of "serious" escape attempts, "exerting negative influence in facility activities," or being a "sexual predator." *Id.*, at 85–86. The LTSU is divided into two levels. All inmates are initially assigned to the most restrictive level, level 2. After 90 days, depending upon an inmate's behavior, an individual may graduate to the less restrictive level 1, although in

practice most do not. *Id.*, at 131–132, 138.

The RHU, SMU, and LTSU all seriously restrict inmates' ordinary prison privileges. At all three units, residents are typically confined to cells for 23 hours a day, have limited access to the commissary or outside visitors, and (with the exception of some phases of the SMU) may not watch television or listen to the radio. *Id.*, at 102; Brief for Petitioner 2–4.

Prisoners at level 2 of the LTSU face the most severe form of the restrictions listed above. They have no access to the commissary, they may have only one visitor per month (an immediate family member), and they are not allowed phone calls except in emergencies. App. 102. In addition they (unlike all other prisoners in the Commonwealth) are restricted in the manner at issue here: They have no access to newspapers, magazines, or personal photographs. *Id.*, at 26. They are nonetheless permitted legal and personal correspondence, religious and legal materials, two library books, and writing paper. *Id.*, at 35, 102, 169. If an inmate progresses to level 1, he enjoys somewhat less severe restrictions, including the right to receive one newspaper and five magazines. *Id.*, at 26, 102. The ban on photographs is not lifted unless a prisoner progresses out of the LTSU altogether. *Ibid.*

B

In 2001, plaintiff Ronald Banks, respondent here, then a prisoner confined to LTSU level 2, filed this federal-court action against Jeffrey Beard, the Secretary of the Pennsylvania Department of Corrections. See Rev. Stat. §1979, 42 U. S. C. §1983. Banks claimed that the level 2 Policy forbidding inmates all access to newspapers, magazines, and photographs bears no reasonable relation to any legitimate penological objective and consequently violates the First Amendment. App. 15; see also *Turner, supra; Overton, supra.* The Secretary, the defendant, petitioner

here; filed an answer. The District Court certified a class composed of similar level 2 inmates, and the court assigned the case to a Magistrate who conducted discovery.

Banks' counsel deposed a deputy superintendent at the prison, Joel Dickson. The parties introduced various prison policy manuals and related documents into the record. And at that point the Secretary filed a motion for summary judgment. He also filed a "Statement of Material Facts Not in Dispute," with a copy of the deputy superintendent's deposition attached as an appendix. See App. 25; Rule 56.1(C)(1) (WD Pa. 2006).

Banks (who was represented by counsel throughout) filed no opposition to the Secretary's motion, but instead filed a cross-motion for summary judgment. Neither that cross-motion nor any other of Banks' filings sought to place any significant fact in dispute, and Banks has never sought a trial to determine the validity of the Policy. Rather, Banks claimed in his cross-motion that the undisputed facts, including those in Dickson's deposition, entitled him to summary judgment. In this way, and by failing specifically to challenge the facts identified in the defendant's statement of undisputed facts, Banks is deemed to have admitted the validity of the facts contained in the Secretary's statement. See Rule 56.1(E).

On the basis of the record as described (the complaint, the answer, the statement of undisputed facts, other agreed-upon descriptions of the system, the Dickson deposition, and the motions for summary judgment), the Magistrate recommended that the District Court grant the Secretary's motion for summary judgment and deny that of Banks. App. to Brief in Opposition 130. The District Court accepted the Magistrate's recommendation. *Id.*, at 131–132.

On appeal, a divided Third Circuit panel reversed the District Court's award of summary judgment to the Secretary. 399 F. 3d 134 (2005). The majority of the panel held

that the prison regulation "cannot be supported as a matter of law by the record in this case." *Id.*, at 148; see also *infra*, at 14–15. The Secretary sought our review of the Appeals Court's judgment, and we granted his petition. 546 U. S. ___ (2005).

II

Turner v. *Safley*, 482 U. S. 78 (1987), and *Overton* v. *Bazzetta*, 539 U. S 126 (2003), contain the basic substantive legal standards governing this case. This Court recognized in *Turner* that imprisonment does not automatically deprive a prisoner of certain important constitutional protections, including those of the First Amendment. *Id.*, at 93; see also *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 348 (1987). But at the same time the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere. See, *e.g.*, *Turner*, *supra*, at 84–85. As *Overton* (summarizing pre-*Turner* case law) pointed out, courts owe "substantial deference to the professional judgment of prison administrators." 539 U. S., at 132. And *Turner* reconciled these principles by holding that restrictive prison regulations are permissible if they are "'reasonably related' to legitimate penological interests," 482 U. S., at 87, and are not an "exaggerated response" to such objectives, *ibid.*

Turner also sets forth four factors "relevant in determining the reasonableness of the regulation at issue." *Id.*, at 89. First, is there a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"? *Ibid.* Second, are there "alternative means of exercising the right that remain open to prison inmates"? *Id.*, at 90. Third, what "impact" will "accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally"? *Ibid.* And, fourth, are "ready alternatives" for furthering the governmental

interest available? *Ibid.*

This case has arrived in this Court in the context of the Secretary's motion for summary judgment. Thus we must examine the record to see whether the Secretary, in depositions, answers to interrogatories, admissions, affidavits and the like, has demonstrated "the absence of a genuine issue of material fact" and his entitlement to judgment as a matter of law. See, *e.g.*, Fed. Rule Civ. Proc. 56; *Celotex Corp.* v. *Catrett*, 477 U. S. 317 (1986).

If the Secretary has done so, then we must determine whether Banks, the plaintiff, who bears the burden of persuasion, *Overton, supra*, at 132, has "by affidavits or as otherwise provided" in Rule 56 (*e.g.* through depositions, etc.) "*set forth specific facts showing that there is a genuine issue for trial.*" Rule 56(e) (emphasis added). If not, the law requires entry of judgment in the Secretary's favor. See *Celotex Corp., supra*, at 322 (Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

We recognize that at this stage we must draw "all justifiable inferences" in Banks' "favor." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986). In doing so, however, we must distinguish between evidence of disputed facts and disputed matters of professional judgment. In respect to the latter, our inferences must accord deference to the views of prison authorities. *Overton, supra.* Unless a prisoner can point to sufficient evidence regarding such issues of judgment to allow him to prevail on the merits, he cannot prevail at the summary judgment stage.

III

The Secretary in his motion set forth several justifica-

tions for the prison's policy, including the need to motivate better behavior on the part of particularly difficult prisoners, the need to minimize the amount of property they control in their cells, and the need to assure prison safety, by, for example, diminishing the amount of material a prisoner might use to start a cell fire. We need go no further than the first justification, that of providing increased incentives for better prison behavior. Applying the well-established substantive and procedural standards set forth in Part II, we find, on the basis of the record before us, that the Secretary's justification is adequate. And that finding here warrants summary judgment in the Secretary's favor.

A

The Secretary rested his motion for summary judgment primarily upon the statement of undisputed facts along with Deputy Prison Superintendent Dickson's affidavit. The statement of undisputed facts says that the LTSU's 40 inmates, about 0.01 percent of the total prison population, constitute the "'worst of the worst,'" those who "have proven by the history of their behavior in prison, the necessity of holding them in the rigorous regime of confinement" of the LTSU. App. 26. It then sets forth three "penological rationales" for the Policy, summarized from the Dickson deposition:

> (1) to "motivat[e]" better "behavior" on the part of these "particularly difficult prisoners," by providing them with an incentive to move to level 1, or out of the LTSU altogether, and to "discourage backsliding" on the part of level 1 inmates;
>
> (2) to minimize the amount of property controlled by the prisoners, on the theory that the "less property these high maintenance, high supervision, obdurate troublemakers have, the easier it is for . . . correctional officer[s] to detect concealed contraband [and]

> to provide security"; and
> (3) to diminish the amount of material (in particular newspapers and magazines) that prisoners might use as weapons of attack in the form of "'spears'" or "'blow guns,'" or that they could employ "as tools to catapult feces at the guards without the necessity of soiling one's own hands," or use "as tinder for cell fires." *Id.*, at 27.

As we have said we believe that the first rationale itself satisfies *Turner*'s requirements. First, the statement and deposition set forth a "'valid, rational connection'" between the Policy and "'legitimate penological objectives.'" 482 U. S., at 89, 95. The deputy superintendent stated in his deposition that prison authorities are "very limited . . . in what we can and cannot deny or give to [a level 2] inmate [who typically has already been deprived of almost all privileges, see *supra*, at 2–3], and these are some of the items that we feel are legitimate as incentives for inmate growth." App. 190. The statement of undisputed facts (relying on the deposition) added that the Policy "serves to encourage . . . progress and discourage backsliding by the level 1 inmates." *Id.*, at 27.

These statements point to evidence—namely, the views of the deputy superintendent—that the regulations do, in fact, serve the function identified. The articulated connections between newspapers and magazines, the deprivation of virtually the last privilege left to an inmate, and a significant incentive to improve behavior, are logical ones. Thus, the first factor supports the Policy's "reasonableness."

As to the second factor, the statement and deposition make clear that, as long as the inmate remains at level 2, *no* "alternative means of exercising the right" remain open to him. *Turner, supra*, at 90. After 90 days the prisoner may be able to graduate to level 1 and thus regain his

access to most of the lost rights. In the approximately 2 ½ years after the LTSU opened, about 25 percent of those confined to level 2 did graduate to level 1 or out of the LTSU altogether. App. 138; Reply Brief for Petitioner 8. But these circumstances simply limit, they do not eliminate, the fact that there is no alternative. The absence of any alternative thus provides "some evidence that the regulations [a]re unreasonable," but is not "conclusive" of the reasonableness of the Policy. *Overton*, 539 U. S., at 135.

As to the third factor, the statement and deposition indicate that, were prison authorities to seek to "accommodat[e] . . . the asserted constitutional right," the resulting "impact" would be negative. That circumstance is also inherent in the nature of the Policy: If the Policy (in the authorities' view) helps to produce better behavior, then its absence (in the authorities' view) will help to produce worse behavior, *e.g.*, "backsliding" (and thus the expenditure of more "resources" at level 2). *Turner*, 482 U. S., at 90. Similarly, as to the fourth factor, neither the statement nor the deposition describes, points to, or calls to mind any "alternative method of accommodating the claimant's constitutional complaint . . . that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests." *Id.*, at 90–91.

In fact, the second, third, and fourth factors, being in a sense logically related to the Policy itself, here add little, one way or another, to the first factor's basic logical rationale. See *post*, at 6 (opinion of STEVENS, J.) (noting that "deprivation theory does not map easily onto several of the *Turner* factors"), cf. *post*, at 5-6 (opinion of THOMAS, J.) (similar). The fact that two of these latter three factors seem to support the Policy does not, therefore, count in the Secretary's favor. The real task in this case is not balancing these factors, but rather determining whether the Secretary shows more than simply a logical relation, that

is, whether he shows a *reasonable* relation. We believe the material presented here by the prison officials is sufficient to demonstrate that the Policy is a reasonable one.

Overton provides significant support for this conclusion. In *Overton* we upheld a prison's "severe" restriction on the family visitation privileges of prisoners with repeat substance abuse violations. 539 U. S., at 134. Despite the importance of the rights there at issue, we held that withholding such privileges "is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose." *Ibid.*

The Policy and circumstances here are not identical, but we have not found differences that are significant. In both cases, the deprivations at issue (all visits with close family members; all access to newspapers, magazines, and photos) have an important constitutional dimension. In both cases, prison officials have imposed the deprivation at issue only upon those with serious prison-behavior problems (here the 40 most intractable inmates in the Commonwealth). In both cases, prison officials, relying on their professional judgment, reached an experience-based conclusion that the policies help to further legitimate prison objectives.

The upshot is that, if we consider the Secretary's supporting materials, *i.e.*, the statement and deposition), by themselves, they provide sufficient justification for the Policy. That is to say, unless there is more, they bring the Policy within *Turner*'s legitimating scope.

B

Although summary judgment rules provided Banks with an opportunity to respond to the Secretary's materials, he did not offer any fact-based or expert-based refutation in the manner the rules provide. Fed. Rule Civ. Proc. 56(e)

(requiring plaintiff through, *e.g.*, affidavits, etc., to "*set forth specific facts showing that there is a genuine issue for trial*" (emphasis added)). Instead, Banks filed his own cross-motion for summary judgment in which he claimed that the Policy fell of its own weight, *i.e.*, that the Policy was "unreasonable as a matter of law." Plaintiffs' Brief in Support of Motion for Summary Judgment in C. A. 01–1956 (WD Pa.), p. 13 (hereinafter Plaintiffs' Brief). In particular, Banks argued (and continues to argue) that the Policy lacks any significant incentive effect given the history of incorrigibility of the inmates concerned and the overall deprivations associated with the LTSU, Brief for Respondent 22; Plaintiffs' Brief 13. He points in support to certain court opinions that he believes reflect expert views that favor his position. *Abdul Wali* v. *Coughlin*, 754 F. 2d 1015, 1034 (CA2 1985); *Bieregu* v. *Reno*, 59 F. 3d 1445, 1449 (CA3 1995); *Knecht* v. *Collins*, 903 F. Supp. 1193, 1200 (SD Ohio 1995), aff'd in part, rev'd in part, vacated in part, 187 F. 3d 636 (CA6 1999). And he adds that only about one-quarter of level 2 inmates graduate out of that environment.

The cases to which Banks refers, however, simply point out that, in the view of some courts, increased contact with the world generally favors rehabilitation. See *Abdul Wali*, *supra*, at 1034; *Bieregu*, *supra*, at 1449; *Knecht*, *supra*, at 1200. That circumstance, as written about in court opinions, cannot provide sufficient support, particularly as these courts were not considering contexts such as this one, where prison officials are dealing with especially difficult prisoners. Neither can Banks find the necessary assistance in the fact that only one-quarter or so of the level 2 population graduates to level 1 or out of the LTSU. Given the incorrigibility of level 2 inmates—which petitioner himself admits—there is nothing to indicate that a 25 percent graduation rate is low, rather than, as the Secretary suggests, acceptably high.

We recognize that the Court of Appeals reached a contrary conclusion. But in doing so, it placed too high an evidentiary burden upon the Secretary. In respect to behavior-modification incentives, for example, the court wrote that the "District Court did not examine . . . whether the ban was implemented in a way that could modify behavior, or inquire into whether the [Department of Corrections'] deprivation theory of behavior modification had any basis in real human psychology, or had proven effective with LTSU inmates." 399 F. 3d, at 142. And, the court phrased the relevant conclusions in terms that placed a high summary judgment evidentiary burden upon the Secretary, *i.e.*, the moving party. See, *e.g.*, *id.*, at 141 ("[W]e cannot say that the [defendant] has shown how the regulations in this case serve [an incentive-related] purpose"). The court's statements and conclusions here also offer too little deference to the judgment of prison officials about such matters. The court, for example, offered no apparent deference to the deputy prison superintendent's professional judgment that the Policy deprived "particularly difficult" inmates of a last remaining privilege and that doing so created a significant behavioral incentive.

Contrary to JUSTICE GINSBURG's suggestion, *post*, at 2–4, we do not suggest that the deference owed prison authorities makes it impossible for prisoners or others attacking a prison policy like the present one ever to succeed or to survive summary judgment. After all, the constitutional interest here is an important one. *Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective. A prisoner may be able to marshal substantial evidence that, given the importance of the interest, the Policy is not a reasonable one. Cf. 482 U. S., at 97–99 (striking down prison policy prohibiting prisoner marriages). And with or without the assistance that public interest law

firms or clinics may provide, it is not inconceivable that a plaintiff's counsel, through rigorous questioning of officials by means of depositions, could demonstrate genuine issues of fact for trial. Finally, as in *Overton*, we agree that "the restriction here is severe," and "if faced with evidence that [it were] a *de facto* permanent ban . . . we might well reach a different conclusion in a challenge to a particular application of the regulation." 539 U. S., at 134. That is not, however, the case before us.

Here prison authorities responded adequately through their statement and deposition to the allegations in the complaint. And the plaintiff failed to point to "'specific facts'" in the record that could "lead a rational trier of fact to find" in his favor. *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 587 (1986) (quoting Fed. Rule Civ. Proc. 56(e)).

The judgment of the Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 04–1739

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* RONALD BANKS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 28, 2006]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

Judicial scrutiny of prison regulations is an endeavor fraught with peril. Just last Term, this Court invalidated California's policy of racially segregating prisoners in its reception centers, notwithstanding that State's warning that its policy was necessary to prevent prison violence. See *Johnson* v. *California*, 543 U. S. 499 (2005). California subsequently experienced several instances of severe race-based prison violence, including a riot that resulted in 2 fatalities and more than 100 injuries, and significant fighting along racial lines between newly arrived inmates, the very inmates that were subject to the policy invalidated by the Court in *Johnson*. See Winton & Bernstein, More Violence Erupts at Pitchess; Black and Latino inmates clash at the north county jail, leaving 13 injured, Los Angeles Times, Mar. 1, 2006, Metro Desk, p. B1. This powerful reminder of the grave dangers inherent in prison administration confirms my view that the framework I set forth in *Overton* v. *Bazzetta*, 539 U. S. 126, 138 (2003) (opinion concurring in judgment), is the least perilous approach for resolving challenges to prison regulations, as well as the approach that is most faithful to the Constitution. Accordingly, I concur only

in the judgment of the Court.

I

Both the plurality and the dissent evaluate the regulations challenged in this case pursuant to the approach set forth in *Turner* v. *Safley*, 482 U. S. 78 (1987), which permits prison regulations that "impinge[] on inmates' constitutional rights" if the regulations are "reasonably related to legitimate penological interests." *Id.*, at 89. But as I explained in *Overton*, *Turner* and its progeny "rest on the unstated (and erroneous) presumption that the Constitution contains an implicit definition of incarceration." *Overton*, 539 U. S., at 139 (opinion concurring in judgment). Because the Constitution contains no such definition, "States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations—*provided only that those deprivations are consistent with the Eighth Amendment.*" *Ibid.* (emphasis in original). Respondent has not challenged Pennsylvania's prison policy as a violation of the Eighth Amendment, and thus the sole inquiry in this case is whether respondent's sentence deprived him of the rights he now seeks to exercise. *Id.*, at 140.

"Whether a sentence encompasses the extinction of a constitutional right enjoyed by free persons turns on state law, for it is a State's prerogative to determine how it will punish violations of its law." *Ibid.*[1] Although the question of whether Pennsylvania intended to confer upon respon-

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[1] As in *Overton*, respondent has not asked this Court to abstain from resolving his constitutional challenge under *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496 (1941) (holding that federal courts should ordinarily abstain where the resolution of a federal constitutional issue may be rendered irrelevant by the determination of a predicate state-law question), and the issue of *Pullman* abstention was not considered below. As a result, respondent has "submitted to the sort of guesswork about the meaning of prison sentences that is the hallmark of the *Turner* inquiry." *Overton*, 539 U. S., at 141 (THOMAS, J., concurring in judgment).

dent and other inmates a right to have unfettered access to newspapers, magazines, and photographs is thus "ultimately for the State itself to answer," in the absence of a resolution of that question by the Pennsylvania Supreme Court, we must resolve it in the instant case. *Id.*, at 141. Fortunately, the answer is straightforward.

In *Overton*, I explained:

> "[s]entencing a criminal to a term of imprisonment may, under state law, carry with it the implied delegation to prison officials to discipline and otherwise supervise the criminal while he is incarcerated. Thus, restrictions imposed by prison officials may also be a part of the sentence, provided that those officials are not acting ultra vires with respect to the discretion given them, by implication, in the sentence." *Id.*, at 140, n. *

A term of imprisonment in Pennsylvania includes such an implied delegation. Pennsylvania inmates are subject to the rules and disciplinary measures set forth by the Pennsylvania Department of Corrections. See, *e.g.*, Bulletin Inmate Discipline, Policy No. DC–ADM 801 (2004), http://www.cor.state.pa.us/standards/lib/standards/DC-ADM_801_Inmate_Discipline.pdf (as visited June 12, 2006, and available in Clerk of Court's case file). And no one disputes that the regulations challenged in the instant litigation fall within the discretion given to the Department of Corrections. As in *Overton*, the conclusion that these regulations are included in the prison sentence is strongly supported by the plurality's *Turner* analysis. A prison policy that has a "valid rational connection [to] the . . . legitimate penological objectives" of improving prison security and discouraging inmate misbehavior, *ante*, at 8 (internal quotation marks omitted), "that [is] designed to avoid adverse impacts on guards, inmates, or prison resources, [and] that cannot be replaced by 'ready alterna-

tives,' [is] presumptively included within a sentence of imprisonment." *Overton*, 539 U. S., at 141–142 (THOMAS, J., concurring in judgment).

The "history of incarceration as punishment [also] supports the view that the sentenc[e] imposed on responden[t] terminated" his unfettered right to magazines, newspapers, and photographs. *Id.*, at 142. As I explained in *Overton*, imprisonment as punishment "became standardized in the period between 1780 and 1865," *id.*, at 143 (citing McGowen, The Well-Ordered Prison: England, 1780–1865, in The Oxford History of the Prison: The Practice of Punishment in Western Society 79 (N. Morris & D. Rothman eds. 1995)), and was distinguished by the prisoner's isolation from the outside world. 539 U. S., at 143. Indeed, both the Pennsylvania and Auburn prison models, which formed the basis for prison systems throughout the Nation in the early 1800's, imposed this isolation specifically by denying prisoners access to reading materials and contact with their families. Rothman, Perfecting the Prison: United States, 1789–1865, in The Oxford History of the Prison 117; see also *id.*, at 118 (explaining that in the Pennsylvania system, inmates were "given nothing to read except the Bible and were prevented from corresponding with friends and family"); S. Christianson, With Liberty for Some: 500 Years of Imprisonment in America 145 (1998) (explaining that in Sing Sing, the standard bearer for the Auburn model, no reading materials of any kind, except the Bible, were allowed inside). Even as the advent of prison libraries increased prisoners' access to reading materials, that access was universally "subject to some form of censorship," such that "inmates of correctional institutions are denied access to books which are freely available to the rest of the community." G. Bramley, Outreach: Library Services for the Institutionalized, the Elderly, and the Physically Handicapped 91, 93 (1978).

Although Pennsylvania "is free to alter its definition of incarceration to include the retention" of unfettered access to magazines, newspapers, and photographs, it appears that the Commonwealth instead sentenced respondent against the backdrop of its traditional conception of imprisonment, which affords no such privileges. *Overton, supra*, at 144–145 (THOMAS, J., concurring in judgment). Accordingly, respondent's challenge to Pennsylvania's prison regulations must fail.

II

This case reveals the shortcomings of the *Turner* framework, at least insofar as that framework is applied to prison regulations that seek to modify inmate behavior through privilege deprivation. In applying the first *Turner* factor, the plurality correctly observes that Pennsylvania's policy of depriving its most incorrigible inmates of their last few remaining privileges bears a "valid rational connection" to the "legitimate penological objectiv[e]" of "encourag[ing] progress and discourag[ing] backsliding" of inmate compliance with prison rules. *Ante*, at 8, 9 (internal quotation marks omitted). Indeed, this Court has previously determined that "[w]ithdrawing . . . privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners." *Overton, supra*, at 134.[2]

Although policies, such as Pennsylvania's, that seek to promote compliance with prison rules by withdrawing

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[2]In my view, this legal conclusion, combined with the deference to the judgment of prison officials required under *Turner*, see *ante*, at 8–15, would entitle prison officials to summary judgment against challenges to their inmate prison deprivation policies in virtually every case. In this context, it is highly unlikely a prisoner could establish that the "connection between the regulation and the asserted goal is arbitrary or irrational." *Shaw* v. *Murphy*, 532 U. S. 223, 229 (2001) (internal quotation marks omitted).

various privileges may always satisfy *Turner*'s first factor, they necessarily fail its second factor. Such policies, by design, do not provide an "alternative means" for inmates to exercise the rights they have been deprived. 482 U. S., at 90. The "legitimate penological objectiv[e]" of encouraging compliance with prison rules by depriving misbehaving inmates of various privileges simply cannot be accomplished if prison officials are required to provide prisoners with an alternative and equivalent set of privileges. Thus, the plurality's observation that respondent's privileges may be restored in response to continued, improved behavior, is simply irrelevant to the second factor of *Turner*, which asks only "whether . . . alternative means of exercising the right . . . remain open to prison inmates." *Ibid.* The answer in the context of privilege deprivation policies is always no, thus demonstrating the difficulty of analyzing such policies under the *Turner* framework.

The third and fourth *Turner* factors are likewise poorly suited to determining the validity of inmate privilege deprivation policies. When the "valid penological objectiv[e]" of a prison policy is encouraging compliance with prison rules, it makes little sense to inquire into "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," or into the availability of "ready alternatives." *Ibid.* At best, such inquiries merely collapse the third and fourth factors into the first, because accommodating the exercise of the deprived right will undermine the incentive effects of the prison policy and because the unavailability of "ready alternatives" is typically (as in this case) one of the underlying rationales for the adoption of inmate privilege deprivation policies.

* * *

Because the prison regulations at issue today are permissible under the approach I explained in *Overton*, I concur in the judgment of the Court.

SUPREME COURT OF THE UNITED STATES

No. 04–1739

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* RONALD BANKS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 28, 2006]

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

By ratifying the Fourteenth Amendment, our society has made an unmistakable commitment to apply the rule of law in an evenhanded manner to all persons, even those who flagrantly violate their social and legal obligations. Thus, it is well settled that even the "'worst of the worst'" prisoners retain constitutional protection, specifically including their First Amendment rights. See, *e.g.*, *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 348 (1987). When a prison regulation impinges upon First Amendment freedoms, it is invalid unless "it is reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U. S. 78, 89 (1987). Under this standard, a prison regulation cannot withstand constitutional scrutiny if "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational," *id.*, at 89–90, or if the regulation represents an "exaggerated response" to legitimate penological objectives, *id.*, at 98.

In this case, Pennsylvania prison officials have promulgated a rule that prohibits inmates in Long Term Segregation Unit, level 2 (LTSU–2), which is the most restrictive condition of confinement statewide, from possessing any

secular, nonlegal newspaper, newsletter, or magazine during the indefinite duration of their solitary confinement. A prisoner in LTSU–2 may not even receive an individual article clipped from such a news publication unless the article relates to him or his family. In addition, under the challenged rule, *any* personal photograph, including those of spouses, children, deceased parents, or inspirational mentors, will be treated as contraband and confiscated. See App. 176.

It is indisputable that this prohibition on the possession of newspapers and photographs infringes upon respondent's First Amendment rights. "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought . . . ." *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965) (citation omitted). See also *Kaplan* v. *California*, 413 U. S. 115, 119–120 (1973) (explaining that photographs, like printed materials, are protected by the First Amendment). Plainly, the rule at issue in this case strikes at the core of the First Amendment rights to receive, to read, and to think.

Petitioner does not dispute that the prohibition at issue infringes upon rights protected by the First Amendment. Instead, petitioner posits two penological interests, which, in his view, are sufficient to justify the challenged rule notwithstanding these constitutional infringements: prison security and inmate rehabilitation. Although these interests are certainly valid, petitioner has failed to establish, as a matter of law, that the challenged rule is reasonably related to these interests. Accordingly, the Court of Appeals properly denied petitioner's motion for summary judgment, and this Court errs by intervening to prevent a trial.

Turning first to the security rationale, which the plurality does not discuss, the Court of Appeals persuasively explained why, in light of the amount of materials LTSU-2 inmates may possess in their cells, petitioner has failed to demonstrate that the prohibition on newspapers, magazines, and photographs is likely to have any marginal effect on security.

> "[E]ach [LTSU–2] inmate is given a jumpsuit, a blanket, two bedsheets, a pillow case, a roll of toilet paper, a copy of a prison handbook, ten sheets of writing paper, several envelopes, carbon paper, three pairs of socks, three undershorts and three undershirts, and may at any point also have religious newspapers, legal periodicals, a prison library book, Bibles, and a lunch tray with a plate and a cup. Many of these items are flammable, could be used [to start fires, catapult feces, or to create other dangers] as effectively as a newspaper, magazine or photograph, and have been so used by [LTSU–2] inmates." 399 F. 3d 134, 143 (2005) (case below).

In fact, the amount of potentially dangerous material to which LTSU-2 inmates are seeking access is quite small in comparison to the amount of material that they already possess in their cells. As the Court of Appeals emphasized, LTSU-2 inmates "are not requesting unlimited access to innumerable periodicals," rather, they are seeking "the ability to have *one* newspaper or magazine and some small number of photographs in their cells at one time." 399 F. 3d, at 144 (emphasis added). In light of the quantity of materials that LTSU–2 inmates are entitled to have in their cell, it does not follow, as a matter of logic, that preventing inmates from possessing a single copy of a secular, nonlegal newspaper, newsletter, or magazine will have any measurable effect on the likelihood that inmates will start fires, hide contraband, or engage in other dan-

gerous actions. See, *e.g.*, *Mann* v. *Smith*, 796 F. 2d 79, 81 (CA5 1986) (Higginbotham, J.) (invalidating a county jail's ban on newspapers and magazines because, "[i]n view of the jail's policy of allowing inmates to possess other material that was flammable and capable of being used to interfere with the plumbing," the rule was "too underinclusive" to be constitutional).[1]

Moreover, there is no record evidence in this case to support a contrary conclusion. Deputy Superintendent Joel Dickson, whose deposition is a major part of the sparse record before us, did not identify any dangerous behavior that would be more likely to occur if LTSU-2 inmates obtained the limited access to periodicals that they are seeking. He did, however, make clear that inmates could engage in any of the behaviors that worried prison officials without using banned materials:

> "Q. Wouldn't it be fair to say that if an inmate wants to start a fire, he could start a fire using writing paper in combination with a blanket or in combination with clothing or linen, bedding materials? He could do that; couldn't he?
>
> "A. Yes.
>
> "Q. If he wants to throw feces, he could use a cup for that; true?
>
> "A. Yes.
>
> "Q. Or if he wants to throw urine, he can use his cup to throw the urine?

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[1] Even less apparent is the security risk that would be posed by respondent's alternative suggestion, which is that LTSU-2 inmates be able to access news periodicals in the LTSU mini-law library, where inmates are already permitted to go to view legal materials during 2-hour blocs of time pursuant to a first-come, first-serve roster of requests. See 399 F. 3d 134, 147 (2005) (case below).

"A. Yes." App. 196–197.[2]

The security-based justification for the ban on personal photographs is even weaker. There is not a single statement in Superintendent Dickson's deposition suggesting that prisoners have used, or would be likely to use, photographic paper to start fires or hurl excrement. Cf. *id.*, at 196 (stating that paper products are generally used to start fires).

Perhaps, at trial, petitioner could introduce additional evidence supporting his view that the challenged regulation is in fact reasonably likely to enhance security or that respondent's request for limited access to newspapers and photographs would, for some as yet undisclosed reason, require an unduly burdensome expenditure of resources on the part of prison officials. However, the above discussion makes clear that, at the very least, "reasonable minds could differ as to the import of the evidence" introduced thus far concerning the relationship between the challenged regulation and petitioner's posited security interest, *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 250 (1986). Accordingly, petitioner's valid interest in security is not sufficient to warrant judgment as a matter of law. See *id.*, at 250–251.

The second rationale posited by petitioner in support of the prohibitions on newspapers, newsletters, magazines, and photographs is rehabilitation. According to petitioner, the ban "provides the [l]evel 2 inmates with the prospect of earning a privilege through compliance with orders and remission of various negative behaviors and serves to encourage the progress and discourage backsliding by the

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[2]See also App. 194 ("I would say there's any number of ways [LTSU–2 inmates hurl feces]. Oftentimes it's with the cups that they're given for their drinks, things like that, any type of container; or . . . a piece of paper or whatever wrapped up that they can use to give a little leverage and fling the materials.").

level 1 inmates." App. 27. In the plurality's view, in light of the present record, this rationale is sufficient to warrant a reversal of the judgment below.

Rehabilitation is undoubtedly a legitimate penological interest. However, the particular theory of rehabilitation at issue in this case presents a special set of concerns for courts considering whether a prison regulation is consistent with the First Amendment. Specifically, petitioner advances a deprivation theory of rehabilitation: Any deprivation of something a prisoner desires gives him an added incentive to improve his behavior. This justification has no limiting principle; if sufficient, it would provide a "rational basis" for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior. See *Kimberlin* v. *United States Dept. of Justice*, 318 F. 3d 228, 240 (CADC 2003) *(per curiam)* (Tatel, J., concurring in part and dissenting in part) (noting that "regulations that deprive prisoners of their constitutional rights will *always* be rationally related to the goal of making prison more miserable"). Indeed, the more important the constitutional right at stake (at least from the prisoners' perspective), the stronger the justification for depriving prisoners of that right. The plurality admits as much: "If the policy (in the authorities' view) helps to produce better behavior, then its absence (in the authorities' view) will help to produce worse behavior. . . ." *Ante*, at 9.

Not surprisingly, as JUSTICE THOMAS recognizes, see *ante*, at 5-6, this deprivation theory does not map easily onto several of the *Turner* factors, which are premised on prison officials presenting a secondary effects type rationale in support of a challenged regulation. For instance, under the deprivation theory of rehabilitation, there could never be a "ready alternative" for furthering the government interest, because the government interest is tied

directly to depriving the prisoner of the constitutional right at issue.

Indeed, the strong form of the deprivation theory of rehabilitation would mean that the prison rule we invalidated in *Turner* would have survived constitutional scrutiny if the State had simply posited an interest in rehabilitating prisoners through deprivation. In *Turner*, we held that a Missouri regulation that forbade inmates from marrying except with the permission of the prison superintendent was facially unconstitutional. See 482 U. S., at 97–99. We rejected the State's proffered security and rehabilitation concerns as not reasonably related to the marriage ban. See *ibid.* Taken to its logical conclusion, however, the deprivation theory of rehabilitation would mean that the marriage ban in *Turner* could be justified because the prohibition furnished prisoners with an incentive to behave well and thus earn early release. Cf. *Safley* v. *Turner*, 586 F. Supp. 589, 593 (WD Mo. 1984) (noting that, under the Missouri regulations partially invalidated by *Turner*, 482 U. S. 78, inmates had been threatened with the loss of parole for attempting to exercise their marriage rights).

In sum, rehabilitation is a valid penological interest, and deprivation is undoubtedly one valid tool in promoting rehabilitation. Nonetheless, to ensure that *Turner* continues to impose meaningful limits on the promulgation of rules that infringe upon inmates' constitutional rights, see *Thornburgh* v. *Abbott*, 490 U. S. 401, 414 (1989) (stating that *Turner*'s reasonableness standard "is not toothless"), courts must be especially cautious in evaluating the constitutionality of prison regulations that are supposedly justified primarily on that basis. When, as here, a reasonable factfinder could conclude that challenged deprivations have a tenuous logical connection to rehabilitation, or are exaggerated responses to a prison's legitimate interest in rehabilitation, prison officials are not entitled to judgment

as a matter of law.

Petitioner argues that, because the various deprivations in the levels of disciplinary confinement short of LTSU–2 are also severe, prison officials have no choice but to deprive inmates of core constitutional rights in LTSU–2 in order to make LTSU–2 more unattractive than other types of segregation. The fact that most States and the Federal Government run their prisons without resorting to the type of ban at issue in this case, see Brief for American Civil Liberties Union et al. as *Amici Curiae* 21,[3] casts serious doubt upon the need for the challenged constitutional deprivations.

In any event, if we consider the severity of the other conditions of confinement in LTSU–2, it becomes obvious that inmates have a powerful motivation to escape those conditions irrespective of the ban on newspapers, magazines, and personal photographs. Inmates in LTSU–2 face 23 hours a day in solitary confinement, are allowed only one visitor per month, may not make phone calls except in cases of emergency, lack any access to radio or television, may not use the prison commissary, are not permitted General Educational Development (GED) or special education study, and may not receive compensation under the inmate compensation system if they work as a unit janitor. Although conditions in LTSU–1 are also harsh, in several respects unrelated to the challenged regulation, they are far more appealing than the conditions in LTSU–2. LTSU–1 inmates may have two visitors and may make one phone call per month; they have access to the commis-

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[3]This is presumably the type of evidence the plurality suggests that respondent should have presented through an affidavit or deposition in response to petitioner's motion for summary judgment. See *Jacklovich* v. *Simmons*, 392 F. 3d 420, 428–429 (CA10 2004) (noting that plaintiffs challenging a prison regulation that limited access to publications had introduced such evidence and concluding that prison officials were not entitled to summary judgment).

sary; they are permitted in-cell GED or special education study; they are permitted a wider range of counseling services; and they are eligible to obtain compensation under the inmate compensation system. See App. 43, 102; 399 F. 3d, at 148 (case below). The logical conclusion from this is that, even if LTSU–2 prisoners were not deprived of access to newspapers and personal photographs, they would still have a strong incentive to gain promotion to LTSU–1.

In addition, prisoners in LTSU–1 do *not* regain access to personal photographs, which means that the ban on photographs cannot be justified by petitioner's "'hope'" that inmates will respond to the constitutional deprivations in LTSU–2 by improving their behavior so they may graduate into LTSU–1, 399 F. 3d, at 142 (quoting petitioner's counsel). Prisoners who "graduate" out of the LTSU–1 and back into the general prison population do regain their right to possess personal photographs, but they also regain so many additional privileges—from ending their solitary confinement to regaining access to television and radio—that it strains credulity to believe that that the possibility of regaining the right to possess personal photographs if they eventually return to the general prison population would have any marginal effect on the actions of prisoners in LTSU–2.

In sum, the logical connection between the ban on newspapers and (especially) the ban on personal photographs, on one hand, and the rehabilitation interests posited by petitioner, on the other, is at best highly questionable. Moreover, petitioner did not introduce evidence that his proposed theory of behavior modification has any basis in human psychology, or that the challenged rule has in fact had any rehabilitative effect on LTSU–2 inmates. *Ibid.*[4]

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[4] I emphasize the lack of evidentiary support for petitioner's position because I believe that, in light of the record currently before the Court,

Accordingly, at least based on the present state of the record, a reasonable factfinder could conclude that prisoners would have a sufficiently powerful incentive to graduate out of LTSU–2 even absent the challenged rule, such that the rule is not likely to have any appreciable behavior modification effect.

The temporal character of LTSU–2 status further undermines petitioner's argument that the ban on newspapers and photographs at issue in this case is reasonably related to a legitimate penological interest. All LTSU inmates must spend 90 days in LTSU–2 status. After that, they receive a review every 30 days to determine if they should be promoted to LTSU–1. That determination is made at the discretion of prison administrators, and is not linked to any specific infraction or compliance. Petitioner acknowledges that "[a]n inmate in the LTSU can remain on Level 2 status indefinitely." App. 26. Indeed, as of August 2002, which is the most recent date for which there is record evidence, roughly three-quarters of inmates placed in LTSU–2 had remained in that status since the inception of the LTSU program over two years earlier. See *id.*, at 138. See also *ante*, at 9 (plurality opinion). In short, as the Court of Appeals explained:

> "[T]he LTSU Level 2 is a unique kind of segregation with characteristics of both disciplinary and administrative segregation. Inmates come to LTSU because of 'unacceptable behaviors' in other institutions, but

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the logical connection between petitioner's stated interest in rehabilitation and the prohibition on newspapers and photographs is exceedingly tenuous. When the logical connection between prison officials' stated interests and the restrictions on prisoners' constitutional rights is not self-evident, we have considered whether prison officials proffered any evidence that their regulations served the values they identified. See, *e.g.*, *Turner* v. *Safley*, 482 U. S. 78, 98 (1987) (discussing lack of evidence in the record to support a ban on marriage as related to prison officials' stated objectives).

> they have not all been adjudicated by a hearing officer to have violated the [Department of Corrections'] rules. The LTSU is not a place where inmates are sent for a discrete period of punishment, pursuant to a specific infraction, but is a place for 'Long Term' segregation of the most incorrigible and difficult prisoners for as long as they fall under that umbrella." 399 F. 3d, at 141 (citation omitted).

The indefinite nature of LTSU–2 confinement, and the fact that as of August 2002 a significant majority of inmates confined at LTSU–2 had remained there since the inception of the program over two years earlier, suggest that the prohibition on newspapers, magazines, and personal photographs is an exaggerated response to the prison's legitimate interest in rehabilitation. It would be a different case if prison officials had promulgated a regulation that deprived LTSU-2 inmates of certain First Amendment rights for a short period of time in response to specific disciplinary infractions. The indefinite deprivations at issue here, however, obviously impose a much greater burden on inmates' ability to exercise their constitutional rights. Absent evidence that these indefinite deprivations will be more effective in achieving rehabilitation than shorter periods of deprivation, a reasonable factfinder could conclude that the challenged regulation "sweeps much more broadly than can be explained by [prison officials'] penological objectives," *Turner*, 482 U. S., at 98, and is hence an exaggerated response to petitioner's legitimate interest in rehabilitation.

In short, as with regard to the current state of the record concerning the connection between the challenged regulation and its effect on prison security, the record is insufficient to conclude, as a matter of law, that petitioner has established a reasonable relationship between his valid interest in inmate rehabilitation and the prohibition

on newspapers, magazines, and personal photographs in LTSU–2.

* * *

What is perhaps most troubling about the prison regulation at issue in this case is that the rule comes perilously close to a state-sponsored effort at mind control. The State may not " 'invad[e] the sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control.' " *Wooley* v. *Maynard*, 430 U. S. 705, 715 (1977) (quoting *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943)). In this case, the complete prohibition on secular, nonlegal newspapers, newsletters, and magazines prevents prisoners from "receiv[ing] suitable access to social, political, esthetic, moral, and other ideas," which are central to the development and preservation of individual identity, and are clearly protected by the First Amendment, *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969). Similarly, the ban on personal photographs, for at least some inmates, interferes with the capacity to remember loved ones, which is undoubtedly a core part of a person's "sphere of intellect and spirit." Moreover, it is difficult to imagine a context in which these First Amendment infringements could be more severe; LTSU-2 inmates are in solitary confinement for 23 hours a day with no access to radio or television, are not permitted to make phone calls except in cases of emergency, and may only have one visitor per month. They are essentially isolated from any meaningful contact with the outside world. The severity of the constitutional deprivations at issue in this case should give us serious pause before concluding, as a matter of law, that the challenged regulation is consistent with the sovereign's duty to treat prisoners in accordance with "the ethical tradition that accords respect to the dignity and worth of every individual." *Overton* v. *Bazzetta*, 539 U. S. 126, 138 (2003)

(STEVENS, J., joined by SOUTER, GINSBURG, and BREYER, JJ., concurring) (citation and internal quotation marks omitted).[5]

Because I believe a full trial is necessary before forming a definitive judgment on the whether the challenged regulation is reasonably related to petitioner's valid interests in security and rehabilitation, I respectfully dissent.

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[5]In contrast to this case, the constitutional right at issue in *Overton* involved freedom of association, which, "as our cases have established . . . is among the rights least compatible with incarceration." *Overton* v. *Bazzetta*, 539 U. S. 126, 131 (2003).

SUPREME COURT OF THE UNITED STATES

No. 04–1739

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* RONALD BANKS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 28, 2006]

JUSTICE GINSBURG, dissenting.

JUSTICE STEVENS comprehensively explains why the justifications advanced by the Secretary of Pennsylvania's Department of Corrections (Secretary) do not warrant pretrial dismissal of Ronald Banks's complaint alleging arbitrary deprivation of access to the news of the day. *Ante*, p. 1. Joining JUSTICE STEVENS' dissenting opinion in full, I direct this separate writing to the plurality's apparent misapprehension of the office of summary judgment.

As the plurality recognizes, *ante*, at 6, there is more to the summary judgment standard than the absence of any genuine issue of material fact; the moving party must also show that he is "entitled to a judgment as a matter of law." Fed. Rule Civ. Proc. 56(c); *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 249–255 (1986); *id.*, at 250–251 (summary judgment is unwarranted "[i]f reasonable minds could differ as to the import of the evidence"). Here, the Secretary cannot instantly prevail if, based on the facts so far shown and with due deference to the judgment of prison authorities, a rational trier could conclude that the challenged regulation is not "reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U. S. 78, 89

(1987).

The showing made by the Secretary in support of summary judgment is slim, the kind that could be made to justify virtually any prison regulation that does not involve physical abuse. The Secretary relies on his own statement of undisputed facts and the deposition of the prison's Deputy Superintendent. The deposition states that "obviously we are attempting to do the best we can to modify the inmate's behavior so that eventually he can become a more productive citizen . . . . We're very limited . . . in what we can and cannot deny or give to an inmate, and [newspapers and photographs] are some of the items that we feel are legitimate as incentives for inmate growth." App. 189, 190. The Secretary's statement of undisputed facts similarly asserts that the regulation "serves to encourage . . . progress and discourage backsliding." *Id.*, at 27.

These statements, the plurality holds, are sufficient to show that the challenged regulation is reasonably related to inmate rehabilitation. *Ante*, at 8. But prison officials "'cannot avoid court scrutiny by reflexive, rote assertions.'" *Shimer* v. *Washington*, 100 F. 3d 506, 510 (CA7 1996) (quoting *Williams* v. *Lane*, 851 F. 2d 867, 886 (CA7 1988) (Flaum, J., concurring in result)). See also *Turner*, 482 U. S., at 98 (noting lack of evidence offered by prison officials to support a ban on inmate marriages); *Murphy* v. *Missouri Dept. of Corrections*, 372 F. 3d 979, 986 (CA8 2004) (applying *Turner* and concluding that the Corrections Department's "documented reason for censoring [a magazine] is too conclusory to support [summary] judgment in its favor"); *Jacklovich* v. *Simmons*, 392 F. 3d 420, 428–434 (CA10 2004). " '[T]raditional deference does not mean that courts [are to] abdicat[e] their duty to protect those constitutional rights that a prisoner retains.' " 399 F. 3d 134, 140 (CA3 2005) (quoting *Fortner* v. *Thomas*, 983 F. 2d 1024, 1029 (CA11 1993)).

The plurality correctly recognizes that it "must draw 'all justifiable inferences' in Banks'[s] 'favor.'" *Ante*, at 6 (quoting *Liberty Lobby*, 477 U. S., at 255). It then backtracks, distinguishing "evidence of disputed facts" from "disputed matters of professional judgment," and asserts that "[i]n respect to the latter, our inferences must accord deference to the views of prison authorities." *Ante*, at 6. While *Turner* deference can and should be incorporated into the evaluation of a motion for summary judgment, that deference should come into play, pretrial, only after the facts shown are viewed in the light most favorable to the nonmoving party and all inferences are drawn in that party's favor. See *Liberty Lobby*, 477 U. S., at 252–255; cf. *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 150–151 (2000).

As I see it, on the limited record thus far made and without the benefit of trial, "the logical connection between the [no news journals] regulation and the asserted goal" could be found by a reasonable trier to be "so remote as to render the policy arbitrary or irrational." *Turner*, 482 U. S., at 89–90. The regulation denies The Christian Science Monitor to inmates housed in level 2 of the prison's long-term segregation unit but allows them The Jewish Daily Forward, based on the determination of a prison official that the latter qualifies as a religious publication and the former does not. App. 179–180; 399 F. 3d, at 147. Prisoners are allowed to read Harlequin romance novels, but not to learn about the war in Iraq or Hurricane Katrina. The first justification cited by prison officials for impinging on inmates' First Amendment rights in this way is too tenuous to be plausible. See *ante*, at 3–5 (STEVENS, J., dissenting) (discussing security rationale); 399 F. 3d, at 142–144 (same). The second could be recited, routinely, to immunize all manner of prison regulations from review for rationality. See *ante*, at 5–12 (STEVENS, J., dissenting) (discussing deprivation/"rehabilitation"

rationale); 399 F. 3d, at 140–142 (same).

Turner came to us after a full trial, and the Court's opinion in that case relied heavily on testimony elicited at trial in evaluating the reasonableness of the regulations at issue. 482 U. S., at 91–93, 96–99. *Overton* likewise came to this Court on a record made at trial. *Overton* v. *Bazzetta*, 539 U. S. 126, 133 (2003). But in this case, the defender of the regulation invites summary judgment. All inferences are to be drawn in favor of the prisoner opposing the regulation, and the question is not which side has the better argument, but whether the Secretary has shown he is entitled to a judgment *as a matter of law*. By elevating the summary judgment opponent's burden to a height prisoners lacking nimble counsel cannot reach, the plurality effectively tells prison officials they will succeed in cases of this order, and swiftly, while barely trying. It suffices for them to say, in our professional judgment the restriction is warranted. The asserted right to read, see *ante*, at 1–2 (STEVENS, J., dissenting), is indeed an "important one," see *ante*, at 12 (plurality opinion of BREYER, J.). Even in highest security custody, a constitutional interest of that order merits more than peremptory treatment.

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For the reasons stated by JUSTICE STEVENS and in this opinion, I would affirm the Third Circuit's judgment reversing the award of summary judgment to the Secretary.